STATE OF MICHIGAN
IN THE SUPREME COURT

Bank of America, N.A.,

Plaintiff-Appellant

v.

First American Title Insurance Company; Patriot Title Agency, LLC; Kirk D. Schieb; Westminster Abstract Company doing business as Westminster Title Agency, Inc.; The Prime Financial Group, Inc.; Valentino M. Trabucchi; Pamela S. Notturno, formerly known as Pamela S. Siira; Douglas K. Smith; Joshua J. Griggs; Nathan B. Hogan; State Value Appraisals LLC, and Christine D. Mays,

Defendants-Appellees,

and

Fred Matson, Michael Lynett, Jo Kay James, and Paul Smith,

Third-party Defendants.

Supreme Court No.: 149599

Court of Appeals No.: 307756

Oakland CC No.: 2010-11206-CK

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PLAINTIFF-APPELLANT BANK OF AMERICA, N.A.'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS[1]

[1] Bookmarks have been included to aid in the electronic review of this brief.

INDEX OF AUTHORITIES

Cases

Statutes

Legislative Analysis

Rules

Other Authorities

INDEX OF EXHIBITS

STATEMENT OF JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction over this case under MCR 7.301(A)(2) and MCR 7.302(H)(3). Plaintiff-Appellant Bank of America, N.A. (the "Bank") timely appealed the March 27, 2014 opinion per curiam of the Court of Appeals, in which the panel ruled that the Bank could pursue only a fraction of its actual losses incurred in connection with four fraudulent mortgage loan transactions, *Bank of America, NA v First American Title Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2014 (Docket No. 307756). The Bank's application to this Court maintained that the Court of Appeals' opinion violated the plain meaning of the Bank's separate contracts with Defendants (closing protection letters issued by First American Title Insurance Company ("First American") and lender's closing instructions agreed to by Westminster Abstract Company doing business as Westminster Title Agency ("Westminster"). The Bank's application further maintained that the "full credit bid rule" as announced by the Court of Appeals in *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63; 761 NW2d 832 (2008) (*New Freedom*)—and applied to the Bank's claims in this case—was not a correct rule of law. In an order dated November 19, 2014, this Court granted the Bank's application and instructed the parties to

> include among the issues to be briefed: (1) whether a separate contract between the lender and the closing agent existed outside of the closing protection letters; (2) whether there was a genuine issue of material fact regarding the closing agent's violation of the terms of the lender's written closing instructions; and (3) whether the full credit bid rule of *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63 (2008), is a correct rule of law and, if so, whether it applies to this case.

Bank of America, NA v First American Title Ins Co, 855 NW2d 747 (Mich, 2014).

STATEMENT OF QUESTIONS PRESENTED

I. In the typical Michigan mortgage loan transaction, the closing agent agrees to be financially liable for its failure to comply with any of the lender's written closing instructions. To further protect against the risk of fraud and improperly closed transactions, the lender also typically receives a closing protection letter ("CPL") that requires the title insurer to reimburse the lender for actual losses arising out of the "fraud or dishonesty" of the closing agent or the failure of the closing agent to follow the lender's closing instructions to the extent that they relate to the limited issues specified in the CPL. Does a separate contract exist between the lender and the closing agent outside of the CPL?

Plaintiff answers: Yes.
Defendant Westminster answers: No.
The circuit court and Defendant First American did not answer this question.
The Court of Appeals answered: No (majority) and Yes (dissent).
This Court should answer: Yes.

II. Defendant Westminster agreed to comply with all of the Bank's written closing instructions. These instructions required, *inter alia*, that Westminster submit complete HUD-1 settlement statements to the Bank for review prior to closing, and stated that third party or seller contributions had to be authorized by the Bank in writing. The details of the transactions as closed by Westminster did not match the HUD-1 settlement statements approved by the Bank. Is there a genuine issue of material fact regarding Westminster's violation of the terms of the Bank's written closing instructions?

Plaintiff answers: Yes.
Defendant Westminster answers: No.
The circuit court and Defendant First American did not answer this question.
The Court of Appeals answered: No (majority) and Yes (dissent).
This Court should answer: Yes.

III. MCL 600.3280 protects mortgagors and persons liable on secured debt from deficiency judgments if a lender makes a "full credit bid." In *New Freedom*, 281 Mich App 63, the Court of Appeals extended this protection to relieve third parties from liability arising from their fraud or misconduct. Is the full credit bid rule of *New Freedom* a correct rule of law and, if so, does it apply to this case?

Plaintiff answers: No.
Defendants First American and Westminster answer: Yes.
The circuit court did not answer this question.
The Court of Appeals ruled that *New Freedom* was controlling precedent.
This Court should answer: No.

IV. Defendant First American issued closing protection letters (CPLs) that require it to reimburse the Bank for actual losses arising from the "fraud or dishonesty" of the closing agent Westminster. Title insurers like First American have made similar promises in CPLs issued in countless other Michigan mortgage loan transactions. The Bank presented evidence and unrebutted expert opinion that Westminster must have known that the subject transactions were fraudulent. Is there a genuine issue of material fact as to whether Westminster closed the transactions with the requisite fraud or dishonesty?

Plaintiff answers: Yes.
Defendants First American and Westminster answer: No.
The circuit court answered: No.
The Court of Appeals answered: No (majority) and Yes (dissent).
This Court should answer: Yes.

INTRODUCTION

In this case, the Court is called upon to settle important issues regarding the rights of parties victimized by mortgage fraud to seek compensation for their losses through civil litigation. Mortgage fraud has a devastating impact on the economy as a whole and has long been a serious problem in Michigan.[2] In response to this problem, Michigan has adopted a public policy against mortgage fraud. In 2008, recognizing that mortgage fraud "directly hurts Michigan consumers[,] [t]he housing market, . . . and mortgage lenders, then-Attorney General Mike Cox created a special unit to address Michigan's mortgage fraud problem.[3] To further address this problem, the Legislature of the State of Michigan made mortgage fraud a separate crime in 2012, MCL 750.219d, and amended various statutes to help the State combat its "significant mortgage fraud problem," Senate Legislative Analysis, SB 43, 249-252, HB 4462, 4478, 4492, January 18, 2012, p 1. Relying on criminal law alone, however, is not enough to truly combat mortgage fraud—or to compensate its many victims. To address this enforcement gap, the mortgage industry relies largely on civil litigation—and the enforcement of contracts with third parties—to seek compensation for the monetary losses caused by mortgage fraud.

In the typical Michigan mortgage loan transaction, a closing agent agrees to be financially liable for its failure to comply with *any* of the lender's written closing instructions, and a title insurer agrees to indemnify the lender (and its borrower) for actual losses arising out

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[2] FBI, Financial Crimes Intelligence Unit, *2010 Mortgage Fraud Report: Year in Review*, pp 4, 6, 10-11, 15, 18 <http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010> (accessed January 14, 2015) (*2010 Mortgage Fraud Report*). The FBI defines mortgage fraud as "a material misstatement, misrepresentation, or omission relied on by an underwriter or lender to fund, purchase, or insure a loan." *Id.*, p 5. The *2010 Mortgage Fraud Report* estimates that more than $10 billion in fraudulent loans were originated in 2010 alone. *Id.*, p 6. The *2010 Mortgage Fraud Report* is the most recent FBI report available.

[3] Attorney General Press Release, *Four Charged in Million Dollar Mortgage Fraud* <http://www.michigan.gov/ag/0,4534,7-164-46849_47203-207249--,00.html> (accessed January 14, 2015).

of "certain 'bad acts'" of the closing agent as specified in a closing protection letter (CPL).[4] In this case, closing agents Westminster and Patriot Title Agency, LLC ("Patriot") accepted the terms of the Bank's written closing instructions and First American issued CPLs to the Bank. Under the terms of these separate agreements, Westminster and Patriot agreed to be "financially liable" for any loss resulting from their failure to follow the Bank's closings instructions and First American agreed to reimburse the Bank for "actual loss" arising out of the "fraud or dishonesty" of Westminster and Patriot. The questions presented to this Court concern whether the Bank—which suffered actual losses of more than $7,000,000 as a result of four fraudulent mortgage loan transactions[5]—can enforce the plain language of these written agreements in order to recover its losses.

The Court of Appeals (with a dissent) ruled that the closing instructions were "modified and limited" by the CPLs issued by First American and the majority failed to apply the identical terms of the separate CPLs consistently to the Westminster closings. In doing so, the panel violated a central tenet of Michigan law: parties are free to contract as they see fit and courts are to enforce parties' agreements as written. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). The Court of Appeals further restricted the Bank's right to enforce the terms of its written agreements by ruling that the version of the "full credit bid rule" as announced by the Court of Appeals in *New Freedom*, 281 Mich App 63, limited the Bank's

[4] Murray, *Closing Protection Letters: What Is (and Is Not) Covered* (2007), p 22 <http://www.americanbar.org/content/newsletter/publications/rpte_e_report_home/rpMurray.html> [click "click here for full article"] (accessed January 16, 2015). John C. Murray is vice president and special counsel for Defendant First American. There are very few publications regarding CPLs, and those that exist tend to be written from the perspective of the counsel of title insurers.

[5] The fraudulent loans involved concealed property flips, straw buyers, and inflated property values—much like the fraud schemes detailed in the *2010 Mortgage Fraud Report*, pp 17-19 (finding Michigan is in top ten of states reporting "same-day property flips").

damages—irrespective of the merits of the Bank's claims *or the language of the parties' written agreements*.

Since the Great Depression, Michigan has by statute, provided a defense for mortgagors—and "any other person liable" for the secured debt—to actions seeking to recover deficiency judgments after the foreclosure of a mortgage by advertisement. MCL 600.3280. This statutory defense allows mortgagors to contest the value of the foreclosed property at the time of the public sale and the amount of the mortgagee's credit bid. *Id.* In creating this statutory defense, the State of Michigan encouraged mortgagees to make bids in the amount of the total debt plus the costs of foreclosure (full credit bids) in order to discharge the mortgage debt and provide certainty to the foreclosure process. In *New Freedom*, the Court of Appeals extended the statutory protection created by MCL 600.3280 to immunize certain third party wrongdoers (not liable for the secured debt) from the consequences of their fraudulent or tortious conduct based on the lender's full credit bid. *New Freedom*'s extension of the full credit bid rule has no basis in Michigan law and should be reversed in order to reestablish certainty in the foreclosure process.[6]

The Bank respectfully requests that this Court reverse the Court of Appeals' rulings as they relate to the Bank's closing instructions and the application of the CPLs to the Westminster closings, and overturn *New Freedom's* extension of the full credit bid rule. Closing instructions and CPLs should be strictly enforced by Michigan courts according to their plain terms and MCL 600.3280 should be applied as written so that lenders are not required to pursue deficiency judgments against already beleaguered borrowers as a condition precedent to seeking recovery

[6] Two other cases in the Court of Appeals directly relating to the application of the full credit bid rule as to CPL claims have been held in abeyance pending a decision by the Court in this case. *Bank of America, NA v Fidelity National Title Ins Co*, unpublished order of the Court of Appeals, issued August 6, 2014 (Docket No. 316538); *Bank of America, NA v Fidelity National Title Ins Co*, unpublished order of the Court of Appeals, issued August 6, 2014 (Docket Nos. 311798; 312426; 313797).

from those contractually liable for the losses caused by mortgage fraud. By reversing these erroneous rulings (and announcing the proper scope of these standard agreements), this Court would provide much-needed clarity regarding the rights of mortgage fraud victims to recover their losses in civil litigation, and further Michigan's announced public policy of fighting mortgage fraud.

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

A. Summary of the subject mortgage loan transactions.

In late 2005 and early 2006, an independent mortgage broker submitted four potential mortgage loans to the Bank.[7] For each potential loan, the Bank was provided with an initial loan application signed by the borrower,[8] (see e.g., 1048JA-1058JA), and information relating to the prospective borrower's credit, income, and assets; the value of the property; the borrower's intended occupancy; and the nature of the transaction in general.[9] The Bank reviewed this information and underwrote the subject loans under its stated income program (as requested by

[7] A mortgage broker is a firm or individual who matches a prospective borrower with a lender. The broker submits the loan application to the lender and gathers information for the lender to consider in making its lending decision—a process commonly referred to as loan origination. See MCL 445.1651a(p). In this case, the now-dissolved company The Prime Financial Group, Inc., served as the mortgage broker. As is customary in the industry, Prime Financial Group entered into a contract with the Bank stating that the broker was a nonexclusive independent contractor, and not an agent of the Bank. See *Mills v Equicredit Corp*, 344 F Supp 2d 1071, 1078 (ED Mich 2004) (finding no agency relationship between broker and lender).

[8] A loan application is a standard form used to obtain financial and personal information from prospective borrowers. Freddie Mac, *Uniform Residential Loan Application* <http://www.freddiemac.com/uniform/unifurla.html> (accessed January 19, 2015). In signing the loan application, the borrower acknowledges that the information provided is true and correct, and that any misrepresentation may result in civil liability or criminal penalties (including those under 18 USC 1001 *et seq*.).

[9] This information was supported by credit reports, real estate appraisals, bank statements, purchase agreements, title commitments, and other documents.

the borrowers).[10] After underwriting the loans, the Bank agreed to finance a percentage of the borrowers' purchases of the properties (located in Oakland and Genesee Counties).[11] The borrowers were required to finance the remaining amounts with their own funds.[12] (835JA; 845JA; 879JA; 906JA.) After approving the loan requests, the Bank issued loan commitments setting forth the conditions upon which the loans could close and disburse, and stating that the loan approval was effective only as long as there was no material change in the information provided to the Bank. (See e.g., 176JA-179JA.)

1. The role of closing agents Westminster and Patriot in the subject mortgage loan transactions.

After loan commitments were issued, the Bank sent "Lender's Closing Instructions" to closing agents Westminster and Patriot.[13] (294JA-308JA.) These closing instructions contained the Bank's conditions upon which the closing agents could disburse the Bank's funds. The Bank's closing instructions required the closing agents to contact the Bank "immediately' if the closing agent could not comply with the instructions and stated that the closing agent would be "financially liable for any loss resulting from [the closing agent's] failure to follow the[] [i]nstructions." (294JA.) The Bank's closing instructions for the subject loans contained, *inter*

[10] Underwriting is the process in which a lender evaluates all of the information in the loan package to make a lending decision on the potential loan. Freddie Mac, *Glossary: Underwriting* <http://www.freddiemac.com/homeownership/glossary/#U> (accessed January 21, 2015). The Bank's stated income program provided applicants with strong credit and assets (i.e., not subprime) the option to apply for loans without income verification if certain parameters and criteria were met. (Ex 1.)

[11] These percentages—or loan-to-values—ranged from 62.5 to 71.4 percent for the subject loans.

[12] Lenders require borrowers to provide these payments from their own funds because such borrowers are less likely to default (thereby forfeiting their down payment or earnest money investment). See Freddie Mac, *Glossary: Down Payment and Earnest Money Deposit* <http://www.freddiemac.com/homeownership/glossary/#D> (accessed January 22, 2015).

[13] Patriot never appeared in this case, and the closing instructions issued to Patriot are not at issue in this appeal.

alia, conditions regarding the closing agent's preparation of the HUD-1 settlement statement,[14] the identities of payees, and the amount of seller concessions or third party contributions authorized by the Bank. (294JA-308JA.) The Bank's closing instructions also informed the closing agents that the Bank may revoke its loan commitments if there is any material variation from the information as stated in the borrower's loan application or supporting documents. (See e.g., 300JA.)

2. The role of First American in the subject mortgage loan transactions and First American's instructions to its issuing agents Westminster and Patriot.

The Bank's closing instructions each required a CPL in a form authorized by the American Land Title Association ("ALTA") be issued in connection with the closing.[15] (See e.g., 294JA.) The closing agents issued CPLs to the Bank for the subject closings in the name of title insurer First American. Each CPL read in part:

> When title insurance of First American Title Insurance Company is specified for your protection[16] or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, *hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by the Issuing Agent (an agent authorized to issue title insurance for the Company), referenced herein and when such loss arises out of*:

[14] A HUD-1 settlement statement is a standard form published by the Department of Housing and Urban Development itemizing all charges imposed on the borrower or seller in a federally related mortgage loan transaction. See 12 USC 2603. The HUD-1 settlement statements prepared by Westminster in this case contain a warning that it is a crime to knowingly make false statements on the form.

[15] The closing instructions refer to an "insured closing letter." This is another term for a CPL. ALTA is the national trade association and the voice of the title insurance industry. American Land Title Association, *About ALTA* <http://www.alta.org/about/index.cfm> (accessed January 16, 2015).

[16] First American title insurance policies were sold to the Bank for the subject transactions.

> 1. Failure of the Issuing Agent to comply with your written closing instructions *to the extent that they relate to* (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or
>
> 2. *Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.*

(223JA; 273JA (emphasis added).)

Westminster and Patriot were "issuing agents" of First American and authorized to issue CPLs to the Bank.[17] (441JA.) First American's agency agreement with Westminster required the agent to close transactions in accordance with prudent practice, the lender's closing instructions, applicable laws and regulations, and the "requirements" established by First American. (283JA, ¶ 2(j).) And First American's agency agreement with Patriot required the agent to act with professional care and skill and in strict compliance with "instructions" issued by First American with respect to safe and acceptable practices. (282JA, ¶2(b).) First American provided its agents with its "requirements" and "instructions" through underwriting alerts and other materials.

In a 1998 underwriting alert,[18] First American instructed its agents regarding land "flips" and "straw man" schemes.[19] (365JA.) According to this alert, the "classic double escrow flip"

[17] Issuing agents (also referred to as title agents) are authorized through agency agreements to sell title insurance policies for title insurers like First American. These issuing agents often also act as closing agents in connection with the mortgage loan transactions in which the title insurer's policies are sold. The issuing agent's agreement with the title insurer typically provides that the issuing agent is not the agent of the insurer for purposes of closing mortgage loan transactions. *Closing Protection Letters: What Is (and Is Not) Covered*, p 2. The Bank has not claimed in this case that Westminster and Patriot were general agents of First American for purposes of the subject closings.

[18] The alert is dated April 7, 2004, but according to First American's representative, the alert was issued by First American in 1998. (422JA.)

occurs when property is acquired and immediately resold for a price much higher than what the seller recently paid. First American warned its agents that these transactions "suggest fraud" against the ultimate lender, and explained how "unscrupulous" parties conspire to victimize lenders with these flips by having straw men obtain mortgage loans based on artificially high prices for the flipped property. First American then instructed its agents to proceed with land flips only with full disclosure acknowledged by the lender in writing and guidance of senior management. (*Id.*)

3. Westminster and Patriot closed the subject mortgage loan transactions and certified compliance with all of the Bank's conditions outlined in the closing instructions.

After issuing the CPLs, the closing agents closed the subject mortgage loan transactions and signed the closing instructions certifying "COMPLIANCE WITH ALL OF THE CONDITIONS OUTLINED IN THE[] INSTRUCTIONS." (See e.g., 296JA.) The basic information regarding the subject transactions as closed is as follows:

Address	Borrower	Loan Amount	Closing Agent
1766 Golf Ridge Drive, Bloomfield Township	Smith, Paul	$1,500,000	Patriot
1550 Kirkway Road, Bloomfield Township	Lynett, Michael	$1,500,000	Patriot
13232 Enid Boulevard, Fenton	Matson, Fred	$3,575,000	Westminster
1890 Heron Ridge Court, Bloomfield Hills	James, Jo Kay	$2,800,000	Westminster

[19] A straw man—also known as a straw buyer or straw borrower—is an "individual who, willingly or by trick, is enticed to pretend to be a legitimate purchaser of property. These individuals generally have good credit, but not enough income to purchase the property." *US v Keller*, unpublished filing in the United States District Court for the Eastern District of Michigan, Doc 1, ¶ 3 (Docket 10-CR-20547), attached as ex 2.

B. The mortgage loan transactions as closed by Patriot (and the Bank's losses).

1. 1766 Golf Ridge Drive, Bloomfield Township.

Paul Smith ("Smith") applied for a $1,500,000 mortgage loan to finance the $2,400,000 purchase of a residence located at 1766 Golf Ridge, Bloomfield Township. The Bank was provided with information supporting Smith's ability to pay the $1,500,000 loan, Smith's intention to occupy the Golf Ridge property, and the $2,400,000 value of the property. After approving Smith's preliminary loan application,[20] the Bank sent its written closing instructions to Patriot listing the Bank's conditions for closing the loan and disbursing its loan funds. Patriot, through employee Jennifer Kojs ("Kojs"), proceeded to close the transaction on December 23, 2005. (413JA.)

The HUD-1 settlement statement for the Golf Ridge transaction states that Smith purchased the property from Spear Holding, LLC for $2,400,000. (414JA.) According to this HUD-1 settlement statement prepared by Patriot, $1,089,284.25 was paid to CBS Settlement Services and $325,000 was paid to Titanic Investment Group. (*Id.*) On the same day of this closing, James and Joanna Spear sold the Golf Ridge property to Michael Kahn for $1,100,000. (833JA.) Patriot did not disclose this flip to the Bank as instructed by First American's 1998 underwriting alert. (784JA-790JA; 365JA.) When deposed in this case, the closing agent Kojs asserted the Fifth Amendment privilege against self-incrimination with regards to her knowledge of this same day flip (549JA-553JA), the $325,000 paid to Titanic Investment Group at closing (556JA-557JA), and the loan payments made on the Golf Ridge loan by checks—signed by

[20] As is customary, the Bank required the closing agents to have the borrowers sign a final loan application at closing. (See, e.g., 300JA).

Kojs—from an account in the name of Bedford Falls Property Management (560JA-563JA; 448JA).

i. The Bank's credit bid and its actual loss for the Golf Ridge loan.

Soon after the Golf Ridge loan closed, the borrower Smith defaulted. The Bank then foreclosed on its mortgage by advertisement in accordance with Michigan's foreclosure statute, MCL 600.3201 *et seq*. In June 2008, the Bank purchased the Golf Ridge property at a public sale with a credit bid of $1,200,000.00 ($334,834.01 less than the amount owed per the Sheriff's Deed).[21] (229JA.) After the Bank acquired title to the Golf Ridge property, the Bank marketed the property for sale. The Bank sold the Golf Ridge property to a third party for $325,000 on or about May 28, 2009, realizing a loss of approximately $1,200,000.[22] (821-822JA.)

2. 1550 Kirkway Road, Bloomfield Township.

Michael Lynett ("Lynett") applied for a $1,500,000 mortgage loan to finance the $2,100,000 purchase of a residence located at 1550 Kirkway Road, Bloomfield Township. The Bank was provided with information supporting Lynett's ability to pay the $1,500,000 loan, Lynett's intention to occupy the Kirkway property, and the $2,100,000 value of the property. After approving Lynett's preliminary loan application, the Bank sent its written closing instructions to Patriot listing the Bank's conditions for closing the loan and disbursing its loan funds. Patriot, through Kojs, proceeded to close the transaction on January 31, 2006. (482JA; 485JA.)

The HUD-1 settlement statements for the Kirkway transaction state that Lynett purchased the property from Kutner Holdings for $2,100,000 with the Bank's loan and a $600,000 earnest

[21] The Bank is the only known bidder at any of the public sales for the subject properties.

[22] The loans at issue in this case were never securitized or sold on the secondary mortgage market. (1647JA-1648JA; 1649JA.)

money deposit.[23] (*Id.*) One the same day as this transaction, the Kirkway property was sold by Abby and Keith Kutner to Michael Kahn (also involved with the Golf Ridge property) for $965,000. (847JA.) According to the warranty deed for this sale, the deed was acknowledged before Kojs. Patriot did not disclose this flip to the Bank as instructed by First American's 1998 underwriting alert, (784JA-790JA; 365JA), and Kojs asserted the Fifth Amendment privilege against self-incrimination with regards to her knowledge of this same day flip (570JA-571JA).

In a separate civil case filed by borrower Lynett (an attorney), Lynett deposed Michael Teaney ("Teaney") regarding the Kirkway closing. Teaney testified that Lynett did not pay the $600,000 deposit listed on the HUD-1 settlement statements. (See 465JA). Teaney also testified that $108,000 from the Lynett loan was originally to be used to make mortgage loan payments on the Lynett loan. (463JA; 470JA.) But this money was actually used to close a transaction involving Jo Kay James and property located at 1890 Heron Ridge.[24] (*Id.*) One version of the HUD-1 settlement statement prepared by Patriot for the Kirkway closing shows the money "earmarked" for loan payments being paid to "Westminster Title." (487JA.) Kojs asserted the Fifth Amendment privilege against self-incrimination regarding the Kirkway closing and the money being used to make the borrower's loan payments. (582JA).

i. The Bank's credit bid and its actual loss for the Kirkway loan.

Soon after the Kirkway loan closed, the borrower Lynett defaulted. The Bank then foreclosed on its mortgage by advertisement in accordance with Michigan's foreclosure statute, MCL 600.3201 *et seq*. In May 2007, the Bank purchased the Kirkway property with a full credit bid of $1,575,206.02. (220JA.) After the Bank acquired title to the Kirkway property, the Bank

[23] Patriot had the parties sign two versions of the HUD-1 settlement statement.

[24] Lynett was questioning Teaney regarding a HUD-1 settlement statement that showed a $180,000 payment to Cobb Financial. (471JA; 483JA.)

marketed the property for sale. The Bank sold the Kirkway property to a third party for $440,000 on or about June 18, 2009, realizing a loss of approximately $1,100,000. (821-822JA.)

C. The mortgage loan transactions as closed by Westminster (and the Bank's losses).

1. 13232 Enid Boulevard, Fenton.

Fred Matson ("Matson") applied for a $3,575,000 mortgage loan to finance the $5,500,000 purchase of a residence located at 13232 Enid Boulevard, Fenton. The Bank was provided with information supporting Matson's ability to pay the $3,575,000 loan, Matson's intention to occupy the Enid property, and the $5,500,000 value of the property. After the Bank approved Matson's preliminary loan application, it sent its written closing instructions to Westminster listing the Bank's conditions for closing the loan and disbursing its loan funds. (175JA.) The Bank's closing instructions for the Enid closing state in pertinent part:

> Loan Purpose: Purchase
>
> ***
>
> - Contact lender immediately if for any reason you cannot comply with these Instructions . . . . As a closing agent you are financially liable for any loss resulting from your failure to follow these Instructions.
> - These Instructions cannot be altered verbally. All alterations or amendments must be in writing and faxed as necessary with a confirmation of receipt.
>
> ***
>
> - Seller concessions/contributions are not permitted unless authorized in writing by Lender.
>
> ***
>
> - In addition to any conditions listed in the attached Conditions Addendum, the following SPECIAL INSTRUCTIONS must be met:
>
> MUST APPROVE HUD PRIOR TO CLOSING.
>
> ***
>
> Sales Price is $5,500,000.
>
> ***
>
> The identity of all payees must appear on the HUD-1.
>
> ***
>
> \+ MAXIMUM 3RD PARTY OR SELLER CONTRIBUTION IS NOT TO EXCEED THE LESSER OF 1) 6.00% OF THE PURCHASE PRICE OR 2) THE ACTUAL CLOSING COSTS.
>
> ***

+ BANK OF AMERICA MUST REVIEW HUD-1 AND ISSUE AN AUTHORIZATION NUMBER PRIOR TO SIGNING OF CLOSING DOCUMENTS.
+ BANK OF AMERICA MAY REVOKE THIS COMMITMENT AT ANY TIME IF THERE IS ANY MATERIAL VARIATION OF THE FACTS FROM THOSE STATED IN THE MORTGAGE APPLICATION, CREDIT REPORT OR ANY OTHER DOCUMENT SUBMITTED IN CONNECTION WITH YOUR APPLICATION.

(294JA-301JA.) Westminster proceeded to close the Enid transaction on December 30, 2005, (905JA), and signed the closing instructions stating that Westminster had "closed th[e] loan in accordance with the foregoing Instructions [and] I CERTIFY COMPLIANCE WITH ALL OF THE CONDITIONS OUTLINED IN THESE INSTRUCTIONS, (296JA).

The HUD-1 settlement statement prepared by Westminster states that Matson purchased the Enid property from Michigan Land Development, LLC for $5,500,000. (905JA.) On the same day as this closing, Michigan Land Development had purchased the Enid property for $3,100,000 from Raji Zaher. (916JA.) The final HUD-1 settlement statement submitted to the Bank by Westminster (after funding), shows that the Bank's funds were disbursed to finance both sales of the Enid property, with the first sale being held in escrow until the Bank funded the second sale. (906JA.) And Westminster's manager Linda Dolan knew that Westminster was not supposed to "do" double escrows. (520JA; see 365JA).

Westminster's manager Linda Dolan had Matson execute a HUD-1 settlement statement showing $1,925,000 due from Matson at closing, $3,150,009.37 due to seller Raji Zaher, and "debt payoffs" of $360,000 to Andrew Davison; $360,000 to Michigan Land Development; $540,000 to Blue Sky Investments; and $340,000 to Invesco Realty. (910JA.) Ms. Dolan then stopped the closing when the seller name changed from Raji Zaher to Michigan Land Development. (517JA.) Westminster employee Jodie Berbas was then instructed to call the

Bank's funder for the loan (Kwannah Clifton) to seek approval for the seller name change.[25] The only record of the conversation is a note by Ms. Berbas that says: "Per Kwannah at BOA no survey is needed. She doesn't know anything about an EMD. She said it is okay that the seller is different person than originally thought. Owner's policy issued with exceptions." (529JA.)

After the Bank had wired its funds to Westminster, Westminster made a number of changes to the HUD-1 settlement statement. (957JA; compare 910JA (printed December 30, 2005) with 905JA (printed January 4, 2006).) The January 4, 2006 HUD-1 settlement statement was not submitted to the Bank until after the Bank's funds had been disbursed by Westminster. (797JA-798JA.) This HUD-1 settlement statement includes changes to lines 103, 201, 206, 220, 301-303, 501, 502, 506, 507, 508, 520, 602, 603, 801, 903, 1302, 1304-1307, and 1400 from the HUD-1 settlement statement submitted to the Bank for approval on December 30, 2005. Under the revised HUD-1 settlement statement, the borrower Matson was required to bring no money to closing, no money was received by the seller Michigan Land Development, Raji Zaher was paid $2,450,884.09 for a "Land Contract," and the "debt payoffs" were adjusted to account for these changes.

Westminster did not seek the Bank's approval to these changes to the HUD-1 settlement statement. Nor did Westminster disclose to the Bank the existence of the double escrow as instructed by First American's 1998 underwriting alert (or the fact that the Enid property was being sold to the new seller for $2.4 million less than the reported purchase price). It was not until days after funding that Westminster sent the Bank a quit claim deed from Raji Zaher to Michigan Land Development disclosing the $3.1 million purchase price. (797JA-798JA; 918JA.)

[25] As testified by Ms. Clifton at her deposition, a "funder" (also referred to as a "loan closer") is the person at the Bank who sends the closing package to the closing agent and reviews the HUD-1 settlement statement. The funder does not perform underwriting functions.

i. The Bank's credit bid and its actual loss for the Enid loan.

Soon after the Enid loan closed, the borrower Matson defaulted. The Bank then foreclosed on its mortgage by advertisement in accordance with Michigan's foreclosure statute, MCL 600.3201 *et seq*. In June 2007, the Bank purchased the Enid property with a full credit bid of $3,944,267.09. (199JA.) After the Bank acquired title to the Enid property, the Bank marketed the property for sale. The Bank sold the Enid property to a third party for $632,500 on or about September 16, 2009, realizing a loss of approximately $3,300,000. (821JA-822JA.)

2. 1890 Heron Ridge, Bloomfield Hills.

Jo Kay James ("James") applied for a $2,800,000 mortgage loan to finance the $4,000,000 purchase of a residence located at 1890 Heron Ridge, Bloomfield Hills. The Bank was provided with information supporting James's ability to pay the $2,800,000 loan, James's intention to occupy the Heron Ridge property, and the $4,000,000 value of the property. After the Bank approved James's preliminary loan application, it sent its written closing instructions to Westminster listing the Bank's conditions for closing the loan and disbursing its loan funds. (302JA-308JA.) The Bank's closing instructions for the Heron Ridge closing included identical conditions as the Enid instructions quoted above (except that the sales price was listed as $4,000,000). Westminster proceeded to close the Heron Ridge transaction on January 31, 2006, (878JA), and signed the closing instructions stating that Westminster had "closed th[e] loan in accordance with the foregoing Instructions [and] I CERTIFY COMPLIANCE WITH ALL OF THE CONDITIONS OUTLINED IN THESE INSTRUCTIONS, (304JA).

The HUD-1 settlement statement prepared by Westminster states that James purchased the Heron Ridge property from Mark Conte for $4,000,000. (878JA.) The HUD-1 settlement statement also states that James made an earnest money deposit in the amount of $1,260,000

($27,398.53 of which was refunded at closing) and that Mr. Conte had to pay $545,899.53 to close the transaction. (*Id.*) The funds required to close actually came from (1) a $420,000 second mortgage closed by Westminster, (899JA); (2) a $108,996 check from Patriot (from the Kirkway loan), (904JA) and (3) the $27,398.53 check James received at closing endorsed back to Westminster, (1003JA).[26] The Bank did not authorize these concessions and contributions, and they were prohibited by the closing instructions since they were greater than the actual closing costs of $17,548.20. (879JA, line 206.)

The borrower James was deposed in this case, and testified that she never occupied the Heron Ridge property, never made mortgage payments, and was only supposed to own the property for a few months before it was flipped. (253JA, 260JA, 261JA, 269JA.) James further testified that she thought she was agreeing to purchase a different property, and first learned of the Heron Ridge property at the Westminster closing. (262JA-263JA.) James also testified that everyone at the closing table knew she was purchasing the home as an investment, and not as a primary residence as represented.[27] (269JA.)

i. The Bank's credit bid and its actual loss for the Heron Ridge loan.

Soon after the Heron Ridge loan closed, the borrower James defaulted. The Bank then foreclosed on its mortgage by advertisement in accordance with Michigan's foreclosure statute, MCL 600.3201 *et seq*. In January 2007, the Bank purchased the Heron Ridge property with a

[26] James confirmed that she did not pay any money to purchase the Heron Ridge property. (261JA.)

[27] James's purchase of the Heron Ridge property was a second generation flip. In May 2005, Mark Conte purchased the property for $3,850,000. (877JA.) According to Mr. Conte, his daughter Blythe Conte had convinced him to participate in a "property flipping" scheme. (867JA.) Mr. Conte never visited the home or made a mortgage payment, and was paid $59,000 for acting as the straw buyer of the property. (868JA.) The previously inflated Heron Ridge property was then sold again on January 31, 2006 to James for $4,000,000.

credit bid of $2,650,000.00 ($218,979.52 less than the amount owed per the Sheriff's Deed). (202JA.) After the Bank acquired title to the Heron Ridge property, the Bank marketed the property for sale. The Bank sold the Heron Ridge property to a third party for $1,150,000 on or about April 22, 2009, realizing a loss of approximately $1,700,000. (821JA-822JA.)

D. First American's claims of fraud against Patriot and known criminal charges stemming from the subject mortgage loan transactions.

In 2008, First American filed civil litigation against Patriot and its principals Kirk Scheib, Kojs, and Randy Saylor ("Saylor") alleging that Patriot prepared, issued, and recorded numerous false and fraudulent documents. (377JA, ¶ 30; 387JA, ¶¶ 83-88.) First American further alleged that Saylor and his companies—including Titanic Investment Group, LLC (which received $325,000 through the Golf Ridge closing) and Bedford Falls Property Management, LLC (which made loan payments on the Golf Ridge loan)—conducted numerous "suspicious" transactions under the auspices of Patriot. (375JA-377JA, ¶¶ 19, 26, 34.) In 2009, a criminal complaint was filed against Saylor by the FBI alleging that he knowingly perpetrated a scheme to defraud lenders through fraudulent mortgage loan documents. (403JA.) The supporting affidavit filed by the FBI outlines "one of the fraudulent schemes perpetrated by [Saylor]," (407JA-411JA), and states that Kojs signed a number of checks written from a Bedford Falls Property Management bank account payable to the lender in an apparent effort to cover up the fraud scheme (410JA, ¶ 6(k).)

In May 2012, an information was filed against Kojs and Saylor by the United States Attorney alleging that they obtained fraudulent mortgage loans on numerous properties—specifically including the Golf Ridge property. (Ex 3, ¶¶ 2, 7.) According to the information, Saylor and Kojs recruited straw buyers and caused material information submitted to lenders during the mortgage loan origination process to be falsified. (*Id.* at ¶¶ 4-7.) In September 2012,

Kojs pleaded guilty to falsifying information regarding straw buyers as charged in the information.[28] (Ex 4, p 2.)

In December 2010, Thomas Keller pleaded guilty to Financial Institution Fraud for using Michigan Land Development—the seller of the Enid property—to "facilitate the purchase and sale of properties with fraudulently inflated appraised values and false buyer asset and income information. *US v Keller*, unpublished filing in the United States District Court for the Eastern District of Michigan, Doc 8 (Docket 10-CR-20547) (ex 5).

In September 2012, Blythe Conte was charged with conspiracy by a Grand Jury for recruiting straw buyers to purchase inflated properties—specifically including the Heron Ridge property—in a scheme involving falsified loan applications and closing documents. *US v Morgan*, unpublished filing in the United States District Court for the Eastern District of Michigan, Doc 35, ¶¶ 4, 7, and 10 (Docket 11-CR-20435) (ex 7). In April 2014, Ms. Conte pleaded guilty to misprision of a felony relating to the fraudulent mortgage scheme. *US v Morgan*, Doc 72, p 2 (ex 8). Ms. Conte's co-defendant, Stacy Morgan,[29] also admitted to causing "false and fraudulent statements" to be made to lenders regarding "inflated straw buyer asset and income information" in connection with the Heron Ridge loan. *US v Morgan*, Doc 69 (ex 9). Morgan's plea agreement states that Morgan and others used a "trick transaction" called a "double closing" to facilitate the fraudulent loans. (*Id.*)

[28] Saylor also pleaded guilty. Saylor was sentenced to 72 months in prison and ordered to pay First American $13,504,914 in restitution. *US v Saylor*, unpublished filings in the United States District Court for the Eastern District of Michigan, Docs 11, 31 (Docket 12-CR-20290), attached as ex 6.

[29] According to the borrower James, Morgan was living in the Heron Ridge property. (260JA.)

E. Summary of proceedings.

In August 2010, the Bank filed its complaint in this action. (41JA.) The Bank brought claims against Patriot and Westminster for breach of the closing instructions and negligent misrepresentation. Patriot never appeared, but Westminster filed an answer and actively defended the claims against it. (130JA.) The Bank also brought claims against First American for breach of the CPLs. First American filed an answer, (74JA), and a counterclaim alleging that the Bank failed to conduct "reasonable underwriting" by approving loans based on false information (123JA-125JA, ¶¶ 146-155). First American also brought third-party claims against the borrowers and cross-claims against all other defendants.[30] (125JA-127JA, ¶¶ 156-166.) In its cross-claims, First American alleged that Patriot and Westminster "fraudulently, recklessly, and/or negligently participated in the [s]ubject [l]oans" and sought indemnification from the closing agents and punitive damages. (126JA-127JA, ¶¶ 159, 166.)

The Bank conducted written discovery regarding the subject mortgage loan transactions and took the depositions of the closing agents. Westminster conducted written discovery regarding the Enid and Heron Ridge loans and took depositions of the Bank regarding the loans closed by Westminster. First American neither issued any written discovery requests to the Bank nor sought to take any depositions of the Bank regarding the loans closed by Patriot. Neither

[30] First American's claims refer to all parties other than Westminster as the "Conspirators." (125JA, ¶ 157.) The Bank's complaint included claims against the appraisers, the broker, the broker's owner, and Kirk Scheib, the purported owner of Patriot. But only Westminster and First American actively defended the Bank's claims, and the other defendants were either defaulted or dismissed.

Westminster nor First American proffered any expert opinions regarding the Bank's underwriting or the actions of the closing agents.[31]

On June 24, 2011,[32] Westminster filed a motion for partial summary disposition arguing that the Bank's claim for negligent misrepresentation should be dismissed because Westminster (as an issuing agent of First American) cannot be liable in tort under the Court of Appeals opinion in *Wormsbacher v Phillip R. Seaver Title Co*, 284 Mich App 1; 772 NW2d 827 (2009),[33] and the Bank's damages for its breach of contract claim must be reduced based on its credit bids under the principles of *New Freedom*. (159JA.) On June 29, 2011, First American filed a notice of concurrence with Westminster's motion. (9JA.) On August 3, 2011, First American filed a motion for summary disposition arguing that the Bank's CPL claims should be dismissed under *New Freedom.* (207JA.) The Bank responded to both motions and requested partial judgment as to its CPL claims for the Patriot closings. (230JA; 343JA.)

After full briefing and a hearing on Defendants' motions, the Oakland County Circuit Court issued an opinion and order granting First American and Westminster summary disposition under MCR 2.116(C)(10) as to all claims, finding that there was no breach of contract by Westminster or First American under *New Freedom*. (22JA.) The Bank filed a motion for reconsideration, (683JA), and attached a Declaration of William Jaquinde containing the proffered expert's opinions that Patriot and Westminster failed to follow the Bank's closing instructions and closed the transactions dishonestly, (764JA). Defendants First American and Westminster filed opposition briefs to the motion for reconsideration. (1035JA; 1091JA.) On

[31] The parties stipulated to postponing expert disclosures until summary disposition motion practice had been concluded.

[32] Discovery was to be completed by August 18, 2011. (12JA, November 17, 2010 Calendar Conference Order.)

[33] The Bank agreed to voluntarily dismiss its negligent misrepresentation claim against Westminster. (246JA.)

November 22, 2011, the circuit court denied the Bank's motion for reconsideration, (1098JA), and on December 15, 2011, the circuit court entered a final order. (1099JA.)

The Bank appealed as of right, and filed its appellant brief on February 14, 2012, (1101JA). Defendants First American and Westminster filed response briefs, (1144JA; 1258JA), and the Bank filed replies to both responses, (1463JA; 1573JA). The Court of Appeals issued an opinion per curiam on March 27, 2014 with a dissent by Chief Judge William B. Murphy. (25JA-40JA.) The Court of Appeals: (1) reversed the circuit court as to First American's liability for the Golf Ridge closing because there was a genuine question of fact that Patriot knew of the fraud scheme and the Bank's claims were not barred by the full credit bid rule of *New Freedom*; (2) held that there was a genuine question of fact that Patriot knew of the fraud scheme for the Kirkway closing, but ruled that claims against First American were barred by the full credit bid applying the reasoning of *New Freedom*;[34] (3) affirmed the circuit court's granting of summary disposition to First American for the Westminster closings because there was no question of fact as to whether Westminster engaged in "fraud or dishonesty" within the meaning of the CPL; and (4) affirmed the circuit court's granting of summary disposition to Westminster because the closing instructions were "modified and limited" by the CPLs and the Bank failed to establish a causal link between the alleged breach and damages.[35] (37JA.)

Chief Judge Murphy agreed with the majority's finding that the Bank's claims for the Kirkway and Enid closings were barred by the full credit bid rule of *New Freedom*, but would have requested a conflict panel challenging *New Freedom*. (39JA) Chief Judge Murphy disagreed with the majority's findings that there was no question of fact as to whether

[34] The full credit bid rule was not ruled on by the circuit court, but it was briefed to the circuit court, addressed in appellate briefs, and discussed at oral argument.

[35] The Court also held that the full credit bid rule of *New Freedom* barred claims relating to the Enid closing.

Westminster engaged in "fraud or dishonesty" for the Heron Ridge and Enid closings and that the Bank could not pursue Westminster for breach of the separate closing instructions. (*Id.*) On April 17, 2014, the Bank filed a motion for reconsideration of the Court of Appeals' opinion. (20JA.) On May 22, 2014, the Court of Appeals issued an order denying the Bank's motion for reconsideration—with Chief Judge Murphy again dissenting. (*Id.*)

The Bank filed its application for leave to appeal to this Court on July 2, 2014. (*Id.*) Defendants First American and Westminster filed answers to the Bank's application, (20JA-21JA), and the Bank filed replies to both answers, (21JA), On November 19, 2014,[36] this Court granted the Bank's application. *Bank of America, NA v First American Title Ins Co*, 855 NW2d 747 (Mich, 2014).

ARGUMENT

A. Michigan has a significant interest in combating and punishing the type of mortgage fraud facilitated by Patriot and Westminster in this case.

First American and Westminster readily admit that the subject mortgage loan transactions were fraudulent—First American even brought claims against the "conspirators" responsible for this fraud and sought punitive damages against the participants in these fraudulent transactions, including Patriot and Westminster. (125JA-127JA.) Multiple individuals, including the closing agent for the Patriot closings, have pleaded guilty to federal crimes relating to these fraudulent transactions. (See e.g., exs 4-6, 8, 9.) And the only borrower to be located and deposed in this case—Jo Kay James—testified unequivocally as to the fraudulent nature of her loan origination documents and the HUD-1 settlement statement prepared by Westminster. (261JA-263JA, 269JA.)

[36] The Bank's time to file its brief on appeal was extended by motion to January 28, 2015. (21JA.)

The mortgage fraud perpetrated against the Bank in this case (property flips, falsified borrower information, inflated appraisals)[37] is exactly the type of fraud the State sought to address with MCL 750.219d. See Senate Legislative Analysis, SB 43, 249-252, HB 4462, 4478, 4492, January 18, 2012, pp 1, 6-7. If the subject closings occurred today, both Patriot and Westminster could be charged with the crime of residential mortgage fraud under MCL 750.219d for concealing material facts from the Bank and facilitating these fraudulent mortgage loan transactions. See MCL 750.219d(1)(a) and (c). And for *each violation* of MCL 750.219d, the closings agents could face 20 years in prison and a $500,000 fine. MCL 750.219d(4)(b) and (5). Closing agents like Westminster and Patriot could be prosecuted under various federal and Michigan laws for mortgage fraud activities prior to the enactment of MCL 750.219d, but Michigan's legislature determined that the scope of Michigan's problem warranted a separate crime—and stiffer penalties for offenders. Senate Legislative Analysis, SB 43, 249-252, HB 4462, 4478, 4492, January 18, 2012, p 1. In doing so, the State explicitly adopted a strong public policy against mortgage fraud. See *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d (2002).[38]

In stark contrast to this stated public policy, the decisions of the Court of Appeals in this case and *New Freedom* work to immunize violators of MCL 750.219d (and their indemnitors) from civil liability for the millions of dollars in losses caused by their mortgage fraud schemes. If permitted to stand, these decisions would allow perpetrators of mortgage fraud to go unpunished,[39] and deny mortgage fraud victims compensation for their losses.[40] Decisions such

[37] Mortgage fraud is particularly resilient, and schemes readily adapt to economic changes and modifications in lending practices. See *2010 Mortgage Fraud Report*, pp 4, 24.

[38] In *Terrien*, this Court announced that "the focus of the judiciary must ultimately be upon the policies that . . . have been adopted by the public . . . and are reflected in our state and federal constitutions, our statutes, and the common law." *Terrien*, 467 Mich at 66-67.

[39] Law enforcement agencies lack the resources necessary to investigate and prosecute every instance of mortgage fraud. For instance, in the first two years after then-Attorney General Mike

as these—that bar countless victims from holding third parties civilly liable for their felonious activities conducted in Michigan—have no place in this State's jurisprudence. A better reasoned rule of law would require Michigan courts to strictly enforce the terms of a lender's agreements with third parties designed to protect against mortgage fraud (closing instructions and CPLs). By their express terms, these agreements allow lenders to recover their losses, and lenders should be free to pursue these losses in civil litigation, without regard to the amount of the credit bid made at the foreclosure sale.[41]

B. As the "gatekeepers" of mortgage loan transactions, closing agents are in a unique position to either prevent or facilitate mortgage fraud.

Closing agents perform a necessary and vital function in mortgage loan transactions—they "sit face-to-face with the parties at the closing table," and "[i]t is in this setting that

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Cox made prosecuting mortgage fraud a priority, the office made only 46 charges. Attorney General Press Release, *Cox Secures Final Conviction in Major Southeast Michigan Mortgage Fraud Bust* <http://www.michigan.gov/ag/0,1607,7-164-34739_34811-244266--,00.html> (accessed January 16, 2015). And a 2014 audit by the US Office of the Inspector General found that despite public statements regarding the importance of fighting mortgage fraud, there has been a decrease in the resources assigned to mortgage fraud investigations and the crime has become a low priority for the FBI. US Office of the Inspector General, Audit Division, *Audit of the Department of Justice's Efforts to Address Mortgage Fraud*, pp 8, 10, 11, 13, 29 <http://www.justice.gov/oig/reports/2014/a1412.pdf> (accessed January 16, 2015).

[40] The granting of restitution is common with criminal prosecutions, but mortgage fraud victims are rarely compensated through restitution because the prosecuted parties tend to be uncollectable. For instance, several individuals have been prosecuted under federal law for their roles in the fraudulent mortgage loans at issue in this case, but the Bank has not been compensated for its losses from these criminal defendants (and it is unlikely that First American has received much of the $13 million in restitution awarded against Saylor). This is why lenders like the Bank must rely on civil litigation (and their contracts with third parties) to pursue culpable parties that are also collectable. And it is worth noting that Defendant First American and Westminster have the ability to make the Bank whole through this civil litigation. First American is a national title insurer with billions of dollars in assets while Westminster is covered under a $2 million dollar insurance policy and backed by the billions of dollars in assets held by its parent company, Toll Brothers, Inc.

[41] The foreclosure process should be utilized as a method of mitigating the lender's losses and to quickly place property back in the private sector, not as a refuge for the parties that facilitated the fraud. See Argument, Section D.

mortgage fraud is detected in many, many cases."[42] In short, the closing agent acts as the "gatekeeper" of the mortgage loan transaction. See *FDIC v Property Transfer Services, Inc*, unpublished opinion of the United States District Court for the Southern District of Florida, issued October 4, 2013, p *45 (Docket No 12-144663).[43] Because closing agents have direct contact with the transaction participants and the exchange of money, they are the best and last opportunity to detect and prevent mortgage fraud. Unfortunately, this gatekeeper function also provides an opportunity for unscrupulous or careless closing agents to facilitate mortgage fraud. See *Pellegrini Testimony*, pp 2-3 (explaining how the participation of closing agent employees is common with property flipping schemes). For this reason, lenders require the protection of closings instructions and CPLs to educate closing agents as to the lender's expectations and provide lenders with financial recourse in the event the closing agent fails to close the loan as agreed or facilitates mortgage fraud.

C. Closing instructions and closing protection letters protect against mortgage fraud and improperly closed mortgage loan transactions, and these agreements should be enforced by Michigan courts as written.

Mortgage loan transactions require lenders to entrust large sums of money to unfamiliar closing agents. Davis, *The Law of Closing Protection Letters*, 36 Tort & Ins L J 845, p 1 (2001). In Michigan (like in most states), lenders protect against the risk that one of these closing agents will improperly disburse the money entrusted to it with two types of written agreements: closings instructions and CPLs. The Bank did just that in this case—receiving signed closing instructions from Patriot and Westminster and signed CPLs from First American. Under the terms of these

[42] *Written Testimony of Frank Pellegrini on Behalf of The American Land Title Association*, p 13, June 18, 2009 < http://www.alta.org/advocacy/mortgagefraudlinks.cfm> [click "Frank Pellegrini Written Testimony"] (accessed January 22, 2015) (*Pellegrini Testimony*).

[43] Unpublished decisions not contained in the Joint Appendix are attached as exhibit 11.

separate agreements, Westminster and Patriot agreed to be financially liable for any loss resulting from the failure to follow the agreed instructions, (294JA), and First American agreed to reimburse the Bank for any losses arising from the "fraud or dishonesty" of the closing agents, (274JA). Similar agreements govern the vast majority of mortgage loan transactions closed in Michigan. Consistent application of these standard contracts by Michigan courts is needed in order to clarify the rights of lenders and provide a strong disincentive to mortgage fraud and improperly closed transactions like those in this case.

It is "an unmistakable and ineradicable part of the legal fabric of our society" that "parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Under these core principles of Michigan law, the Bank's ability to recover under its agreements with Westminster and First American should be restricted *only* by the written terms and conditions of the agreements.[44] The Court of Appeals failed to enforce the unambiguous terms of these agreements by ruling that the agreements between the Bank and Westminster were "modified and limited" by separate CPL agreements with First American, and failing to apply the CPL agreements consistently for each closing. And the Court of Appeals further disregarded the terms of these agreements (which cover the Bank's "loss" and "actual loss") by applying the full credit bid rule of *New Freedom* to reduce the amount the Bank can recover under these agreements.[45]

[44] Clearly, these agreements do not violate public policy as they work to further Michigan's announced interest in fighting mortgage fraud.

[45] The full credit bid rule as announced by the panel in *New Freedom* is discussed in Section D of the Argument.

1. The scope of closing instructions and CPLs in general.

Lenders draft detailed closing instructions to ensure that mortgage loan transactions close to their specifications. (765JA.) These closing instructions are provided to closing agents prior to closing to notify the potential closing agent of the lender's conditions for accepting the closing assignment. (*Id*.) Lender's closing instructions vary widely and can contain conditions regarding all phases of the closing process and fraud prevention.[46] See Nielsen, Title and Escrow Claims Guide (2014), p 14-11. If the closing agent cannot (or will not) comply with these conditions, the closing agent must seek modification from the lender or turn down the closing assignment, (368JA (advising First American's Midwest agents that they should not be "signing off" on "unreasonable" closing instructions and "[s]ometimes it is appropriate to just refuse to accept unreasonable instruction[s]" and 1595JA (advising First American's Michigan agents regarding closing instructions that "[i]t is important . . . to know what you have agreed to pay in the event of an error").)

In addition to closing instructions, a lender also typically requires the added protection of a CPL from the closing agent's title insurance underwriter. A CPL is an indemnity contract issued by a title insurer that requires the title insurer to reimburse a lender (and its borrower) for actual losses arising out of the fraud or dishonesty of the closing agent or the closing agent's

[46] See *MBA, AEA and ALTA Uniform Closing Instructions Project: Online Workshop Presentation* <http://www.mortgagebankers.org/IndustryResources/ResourceCenters/UniformClosingInstructionsComments.htm> [click "Presentation"] (accessed January 24, 2015). First American was one of the presenters of this online workshop. ALTA, of which First American is a primary member, has for years been working with the Mortgage Bankers Association of America and the American Escrow Association to propose uniform closing instructions in an attempt to standardize these instructions. See *Uniform General Closing Instructions: Final Draft* <http://www.alta.org/advocacy/OLD/uci.cfm> [click "Uniform General Closing Instructions – Final Draft"] (accessed January 22, 2015) (*Uniform General Closing Instructions*).

failure to follow a *limited* type of closing instructions. *The Law of Closing Protection Letters*, 36 Tort & Ins L J 845, pp 1, 7; Nielsen, p 14-11 (arguing CPLs were "carefully crafted to apply only to compliance with instructions that are incidental to the issuance of a title insurance policy"). These indemnity contracts are typically demanded by lenders to further offset the risk of malfeasance or defalcation committed by the closing agent by making the significant resources of national title insurers available to lenders in the event of a violation by the closing agent. Gosdin, Title Insurance: A Comprehensive Overview (3d), p 87. Whereas a lender's closing instructions can vary largely from transaction to transaction, CPLs are largely standardized forms drafted by the title insurance industry. *The Law of Closing Protection Letters*, 36 Tort & Ins L J 845, p 2.

2. The Bank's closing instructions should be enforced like any other written contract under Michigan law.

Since at least 1992, First American has warned its issuing agents—like Patriot and Westminster—to "carefully consider" a lender's closings instructions before accepting a closing assignment and "to know what you have *agreed* to pay in the event of an error." (See 1595JA (emphasis added).) And the Uniform General Closing Instructions proposed by industry leaders (including First American) explicitly state that closings instructions are an *agreement* between the lender and closing agent whereby the closing agent agrees to perform services as specified in the instructions and the lender agrees to provide loan documents and loan proceeds to the closings agent. *Uniform General Closing Instructions*, p 5. The majority of the Court of Appeals panel in this case, however, suggested that the Bank's closing instructions did not represent a binding contract between Westminster and the Bank (36JA.)

Under settled Michigan law, a valid contract requires (1) parties competent to contract, (2) a proper subject matter, (3) mutuality of agreement, (4) legal consideration, and (5) mutuality

of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The Bank's closings instructions (like all closing instructions) satisfy all of these elements. There is no issue regarding the competencies of the parties (both sophisticated companies) or the subject matter of the agreement, and the requirements of mutuality and consideration are plainly met. As is customary, the Bank issued written closing instructions to Westminster in which the Bank promised to transfer loan documents and loan proceeds ($6,375,000 for the Enid and Heron Ridge closings) if Westminster complied with all of the conditions outlined in the Bank's closing instructions.[47] Westminster accepted the Bank's offer by performing the closings (and received fees as a result).[48] Westminster further clearly manifested its assent by "signing off" on the closings instructions and certifying its compliance with all of the conditions outlined in the instructions.

Neither Westminster nor the Court of Appeals majority provided any contrary analysis of Michigan contract law that would justify relegating a lender's closing instructions to anything less than a binding and enforceable contract. And this Court should clarify that these standard agreements are to be enforced like any other written contract (just like the language of the Bank's closing instructions suggests and the closing industry itself expects).[49] Further, since

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[47] As advised in First American's underwriting alerts, a lender's closings instructions are essentially offered on a take-it-or-leave it basis. But the "adhesive" nature of these agreements "is of no legal relevance" and the agreements are to be enforced according to their plain language. *Rory v Cont'l Ins Co*, 473 Mich 457, 489; 703 NW2d 23 (2005).

[48] In this sense, closing instructions could be considered unilateral contracts because the contracts are accepted by performance. See *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 138 n 9; 666 NW2d 186 (2003). The particular label attached to these agreements, however, is not relevant for purposes of applying standard contract law principles. *Rory*, 473 Mich at 477.

[49] Other courts have expressly held that a lender's closing instructions constitute a contract between the lender and the closing agent. See e.g., *FDIC v Escrow and Title Services, Inc*, unpublished opinion of the United States District Court of the Eastern District of Michigan, issued May 23, 2011 (Docket No 10-10643) (313JA); *Plaza Home Mortgage, Inc v North American Title Co, Inc*, 184 Cal App 4th 130, 139 (2010); *Old West Annuity & Life Ins Co v*

Westminster offered no traditional contract defenses (such as waiver, fraud, or unconscionability) to the enforcement of the Bank's closings instructions, the contracts should be enforced pursuant to their unambiguous terms.[50] See *Rory*, 473 Mich at 491.

3. Westminster agreed to follow all of the Bank's closing instructions and this agreement was not modified or limited by the separate CPL agreements.

As is the custom and practice with residential mortgage loan transactions, Westminster agreed to be financially liable for any loss resulting from its failure to follow *any* of the Bank's closing instructions. (294JA.) The Court of Appeals (with a dissent), however, ruled that the closings instructions were "modified and limited" by the separate CPL contracts between the Bank and First American. (36JA.) This ruling is contrary to the terms of both the closing instructions (binding contracts under the principles of Michigan law) *and* the CPLs. And the majority provided no justification for finding that the separate CPL contracts modified the closing instructions (or its failure to enforce the terms of the closing instructions as written). See *Wilkie*, 469 Mich at 51-52.

The terms of the closing instructions, as accepted and signed by Westminster, are clear: Westminster must comply with *all* the conditions outlined by the Bank. (294JA.) The Bank's closings instructions further required all "alterations" to be in writing and faxed with a confirmation of receipt. (*Id.*) There simply is no language in these agreements that shows an

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Progressive Closing & Escrows, Inc, 74 Fed Appx 4 (10 CA 2003); *FDIC v Floridian Title Group, Inc*, 972 F Supp 2d 1289, 1295 (SD Fla 2013).

[50] Closing agents like Westminster have argued that their *only* duty to lenders is *contractual*. (158JA-159JA.) Such arguments confuse an issuing agent's duties in issuing title insurance policies and a closing agent's duties in closing transactions. See *Closing Protection Letters: What Is (and Is Not) Covered*, p 2; compare *Wormsbacher*, 284 Mich App at 7-8 with *Smith v First Nat'l Bank & Trust*, 177 Mich App 264, 270; 440 NW2d 915 (1989). But this confusion aptly illustrates the importance of closing instructions in defining the expectations of the parties.

intent to restrict Westminster's contractual duties to just the closing instructions that would *also* trigger liability under the CPLs. Nor do the separate CPL contracts—to which Westminster is *not* a party—indicate an intent to limit Westminster's duty to follow the Bank's closing instructions to only those types of instructions that would trigger CPL coverage. In fact, the CPLs expressly acknowledge that the Bank may incur losses arising from the failure of Westminster to follow closing instructions that are *not* covered by the CPLs. These CPLs state:

> [First American], subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse [the Bank] for actual loss incurred by [the Bank] in connection with such closings when conducted by [Westminster] . . . and *when such loss arises out of*:
>
> > 1. Failure of [Westminster] to comply with [the Bank's] written closing instructions *to the extent that they relate to* (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by [the Bank], but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due [the Bank.]
>
> ***
>
> CONDITIONS AND EXCLUSIONS
>
> > A. *[First American] will not be liable to [the Bank] for loss arising out of*:
> >
> > > 1. *Failure of [Westminster] to comply with [the Bank's] closing instructions which* require title insurance protection inconsistent with that set forth in the commitment issued by [First American]. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in said commitment shall not be deemed to be inconsistent.

(274JA (emphasis added).)

CPLs do not cover each and every violation of a lender's closings instructions by the closing agent. Nielsen, p 14-11 (arguing CPLs were "carefully crafted to apply only to compliance with instructions that are incidental to the issuance of a title insurance policy"). But

the fact that CPLs provide only limited protection regarding the failure to comply with closings instructions is irrelevant to Westminster's direct liability under the closing instructions. The fact that the Bank required the *added* protection of a CPL does not relieve Westminster of its liability under the closing instructions accepted and signed by the closing agent. There is simply no known authority for the proposition that a contract between party A and party B can be modified and limited by a separate and distinct contract between party A and party C.[51] *FDIC v First American Title Ins Co*, unpublished opinion of the United States District Court for the Central District of California, issued August 24, 2011, p *18 (Docket No 10-0713) (finding closing instructions not modified by separate letter from First American) (1669JA).

Under the majority's holding, the Bank has no recourse for losses not covered by the CPLs, and the only way for lenders to hold closing agents to their full agreements would be for the lender to forgo "the financial resources of the national title insurance underwriter" provided by CPLs. *New Freedom*, 281 Mich App at 80. Nothing in the language of the subject contracts (the closing instructions and the CPLs) or the conduct of the parties in this case supports such a ruling. This ruling is also directly contrary to the standards of the industry—which require closing agents to comply with *all* of a lender's instructions[52]—and impairs the ability of parties to freely contract. If this decision is allowed to stand, closing agents across the State would be free to ignore countless closing instructions—many of which are designed to detect and prevent

[51] For each closing, the Bank is entitled to recover no more than its total loss. If the Bank were to recover under one of the CPLs for the Westminster closings, this recovery would act as a set-off for any recovery under the closing instructions for that loan. This is the only way that the CPLs can "limit" the Bank's ability to recover under the terms of the closing instructions.

[52] For instance, First American's underwriting alerts make it clear that Westminster could be financially liable for failing to comply with any closing instructions (even unreasonable ones) the agent accepted. (1594JA-1595JA.) And in describing "prudent practice" in First American's agency agreements with Westminster, First American required Westminster to comply with *all* of the lender's closing instructions. (See *id.*;283JA.)

mortgage fraud of the kind addressed by the State in MCL 750.219d.[53] A more reasoned rule of law would be for Michigan courts to apply and enforce lender's closing instructions and CPL contracts pursuant to their separate terms and conditions.

i. There was a genuine issue of material fact regarding Westminster's violation of the terms of the Bank's written closing instructions.

The Bank's closing instructions required Westminster to get the Bank's approval of HUD-1 settlement statements *prior* to closing, identify all payees on the HUD-1 settlement statements, and limit contributions from the sellers or third parties to those amounts authorized by the Bank in writing.[54] (293JA.) The Bank's closing instructions also conditioned the loans on there not being material variation between the actual facts underlying the loan transaction and the facts as submitted to the Bank. (See *id.*) Contrary to the holding of the majority of the Court of Appeals in this case, Westminster was not free to disregard these instructions simply because they are not "incidental to the issuance of a title insurance policy." See Nielsen, p 14-11. Therefore, the Court must consider whether there was a genuine issue of material fact regarding Westminster's violation of the terms of the Bank's closing instructions. The Bank introduced substantial evidence concerning Westminster's violation of the Bank's closing instructions (including, unrebutted expert opinion (764JA)).[55] There was also ample evidence that the subject

[53] For instance, the current draft of the Uniform General Closing Instructions includes numerous instructions that have nothing to do with the status of a lender's mortgage lien, or other items that would clearly trigger liability under paragraph 1 of a CPL like the ones issued by First American in this case. See e.g., *Uniform General Closing Instructions*, pp 34-37 (instructions regarding fraud prevention).

[54] Neither Westminster nor the Court of Appeals argued that these instructions were ambiguous.

[55] The Bank detailed some of the violations of its closing instructions for both Westminster transactions in its answers to Westminster's interrogatories. (784 JA-791JA.)

loans would not have closed had Westminster properly followed the Bank's closing instructions. (784JA-790JA; 819JA-820JA.)

There were numerous questions of material fact as to whether Westminster violated the Bank's closing instructions for the Enid closing. As discussed in the Statement of Facts, there is no evidence to support the proposition that Westminster provided the substantially changed final HUD-1 settlement statement to the Bank for approval as required by the closing instructions. Similarly, there is no evidence that the change between the payees on the HUD-1 settlement statement submitted to the Bank for approval (910JA) and the unapproved HUD-1 settlement statement that was transmitted to the Bank after closing (905JA) were ever disclosed to the Bank prior to the disbursement of the Bank's funds. Moreover, by distributing the loan proceeds in a manner inconsistent with the approved HUD-1 settlement statement, Westminster changed material facts stated in a document submitted in connection with the borrower's application—contrary to the Bank's express closing instructions. The HUD-1 settlement statement submitted to the Bank by Westminster did not disclose the payoff of Raji Zaher's multimillion dollar land contract, hundreds of thousands of dollars in changes to amounts distributed as debt payoffs, and some twenty other material changes between it and the final, unapproved HUD-1 settlement statement. (See 905JA-914JA.)

There were also numerous questions of material fact as to whether Westminster violated the Bank's closing instructions for the Heron Ridge closing. Contrary to what the closing instructions required, and as outlined in the Statement of Facts, Westminster had clear reason to know that the borrower was buying this property as an investment and not for "Purchase" as set forth in the instructions, that the borrower had not provided the down payment that was represented on the HUD-1 settlement statement (an unauthorized seller's concession), closed an

undisclosed second mortgage loan (an unauthorized third party contribution), and received additional funds from Patriot (another unauthorized third party contribution) to close the transaction.

These wide ranging discrepancies represent clear issues of fact as to whether Westminster materially breached the closing instructions for the Enid and Heron Ridge closings. The majority clearly erred in finding that reasonable minds could not differ as to the conclusions to be drawn from this evidence of Westminster's violations of the Bank's closing instructions. See *Bean v Directions Unlimited*, 462 Mich 24, 34 n 12; 609 NW2d 567 (2000) ("The Court of Appeals role is not to 'find' facts, but rather, to review the trial court's decision without substituting its view of the evidence for the jury's.") The Bank should be permitted to present the evidence of Westminster's violations to the jury in order to determine if Westminster's breaches were a legal cause of the Bank's losses.[56] *McMillan v State Highway Comm*, 426 Mich 46, 63 n 8; 393 NW2d 332 (1986). (See 39JA.)

a. The Bank's underwriting does not excuse Westminster's violations of the terms of the Bank's written closing instructions.

The majority of the Court of Appeals found that the Bank's "deficient underwriting policies" caused the Bank's losses. (See 36JA.) Defendants did not proffer any expert testimony regarding the Bank's underwriting practices in general or as to the specific transactions.[57] Instead, Defendants simply argued that the Bank *might* have discovered the fraud had it verified the borrowers' stated incomes. (27JA.) Not only does this argument falsely assume that

[56] Westminster itself argued to the circuit court that causation would be an "interesting question" for the jury. (155JA.)

[57] Therefore, summary disposition on this issue is inappropriate. See *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994) (expert testimony usually required to establish standard of conduct, breach, and causation).

Michigan mortgage fraud is limited to stated income loans, it also ignores the growing body of case law that supports the position that a lender's underwriting is *irrelevant* in the context of breach of contract claims by the lender. See e.g., *Fifth Third Mortgage Co v Chicago Title Ins Co*, 692 F3d 507, 511 (CA 6, 2012) (title policy); *JPMorgan Chase Bank, NA v First American Title Ins Co*, 795 F Supp 2d 624, 633 (ED Mich 2011), aff'd, 750 F3d 573 (CA 6, 2014) (CPL); *FDIC v First American Title Ins Co*, unpublished opinion of the United States District Court for the Central District of California, issued August 24, 2011 (Docket No 10-0713) (closing instructions) (1669JA); and *FDIC v Property Transfer Services., Inc*, unpublished opinion of the United States District Court for the Southern District of Florida, issued October 4, 2013 (Docket No 10-cv-80533) (ex 11). The Court of Appeals majority ignored this case law in order to craft an unsupported post hoc justification for Westminster's malfeasance.

4. CPLs provide important and expansive protection for lenders and borrowers against the fraud or dishonesty of closing agents.

It is an unfortunate reality of the lending industry that there is little a lender can do to prevent mortgage fraud if a closing agent, who has direct contact with the perpetrators and the purported exchange of funds, is complicit, or an active participant, in the scheme. For this reason, lenders generally will not entrust money or loan documents to closing agents unless the title insurer has issued a CPL covering the closing. *The Law of Closing Protection Letters*, 36 Tort & Ins L J 845, p 1. In this case, First American issued CPLs to the Bank that required First American to reimburse the Bank for actual losses arising out of the "fraud or dishonesty" of the closing agents handling the Bank's funds or documents.[58]

[58] Paragraph 1 of the CPLs—regarding the failure of the closing agents to follow a very limited type of closings instructions—was discussed above.

First American argued that this language only covered fraud or dishonesty linked to "concealed disbursements, shortages, or unpaid prior lien holders." (23JA.) Such a narrow reading is contrary to the written terms of these agreement and the overwhelming weight of CPL case law—which has read these indemnity contracts expansively when dealing with fraudulent mortgage loan transactions like those at issue in this case. See e.g., *First American Title Insurance Co v Vision Mortgage Corp*, 298 NJ Super 138; 689 A2d 154 (1997); *JPMorgan Chase Bank, NA v First American Title Ins Co*, 2011, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 26, 2011 (Docket No 09-14891) (1011JA), aff'd, 750 F3d 573 (CA 6, 2014); *Walsh Securities, Inc v Cristo Prop Mgt, Ltd*, 858 F Supp 2d 402, 419 (D NJ 2012); *Property Transfer Services, Inc*, (Docket No 10-cv-80533). The Court of Appeals rejected First American's narrow interpretation, and reasonably held that the "fraud or dishonesty" language covers a broad range of misconduct by closing agents, including suppressing material facts or closing a transaction despite knowledge of the underlying fraud. The Bank requests that the Court adopt this interpretation of this standard CPL language as a rule of law.[59] This interpretation, however, was not applied consistently by the Court of Appeals. After finding that the Bank had presented sufficient evidence with regards to the "fraud or dishonesty" of Patriot,[60] the Court of Appeals (with a dissent) ruled that the Bank's CPL claims as to Westminster could not proceed. The Bank, however, had presented evidence and proffered expert testimony that Westminster *must have known that the subject transactions*

[59] First American did not file a cross application for leave to appeal, or even address the majority's interpretation of the phrase "fraud or dishonesty" in its answer to the Bank's application. First American has therefore waived any right to contest the interpretation of this phrase by the Court of Appeals. It is not surprising that First American conceded this issue as the Court of Appeals' interpretation of "fraud or dishonesty" mirrors that of every other court to have considered the issue.

[60] Again, First American did not file a cross application as to this finding, and the Bank requests that the Court adopt the Court of Appeals' findings as to the Patriot closings.

were fraudulent. In disregarding this evidence, the Court improperly created a heightened standard for lenders (and their borrowers) to meet in order to take CPL claims to a jury, and severely limited the ability of mortgage fraud victims to seek recourse for losses caused by mortgage fraud.

i. There was a genuine issue of material fact regarding Westminster's "fraud or dishonesty" in closing the subject transactions.

In construing the CPLs, the majority found that the protection for the "fraud or dishonesty" of the closing agents is not limited to "concealed disbursements, shortages, or unpaid prior lien holders."[61] (32JA.) According to the majority, the terms "fraud or dishonesty" are "quite broad" and include "constructive fraud—an act of deception or a misrepresentation without an evil intent" and "suppressing facts—silent fraud—where circumstances establish a legal duty to make *full* disclosure." (*Id.*, p 9 (emphasis added).) This is in line with other authorities interpreting similar CPL contracts, and a well-reasoned interpretation for all Michigan courts to follow.

The Court of Appeals then performed a detailed analysis of the evidence presented by the Bank as to the fraud or dishonesty of Patriot. The Court properly drew an adverse inference from the assertion of the Fifth Amendment privilege against self-incrimination by closing agent Kojs—who later pleaded guilty for her role in the fraud—as to the subject closings, and appropriately inferred Patriot's knowledge of the fraud from First American's underwriting alert regarding fraudulent double escrows and flips as well as the proffered expert testimony of

[61] The Court also stated its belief that the *New Freedom* panel misread the word "your" to modify "documents" rather than only "funds."(31JA n 5.) As such, the Court would have considered discrepancies in all documents (including the HUD-1s) if not for *New Freedom*. (See *id.*) The Bank requests that this Court adopt the panel's preferred interpretation of this CPL language.

William Jaquinde. (See 32JA-33JA.) Based on this evidence, the Court concluded that there was a genuine issue of fact that Patriot engaged in "fraud or dishonesty" in closing the Golf Ridge and Kirkway transactions. Specifically, the majority found that "[t]aken together, plaintiff's proposed expert testimony and First American's underwriting alert would provide *significant* evidence from which to infer that the closing agents in this case knew or *should have known* the transactions at issue were fraudulent." (33JA (emphasis added).)

The majority, however, completely disregarded this same "significant" evidence in concluding that there was no issue of fact that "Westminster knew of or participated in the underlying fraud." (35JA.) But just like Patriot, Westminster was warned by First American to avoid closing double escrows and flips because they "suggest fraud."[62] (367JA.) Further, proffered expert William Jaquinde found that *both* Patriot *and* Westminster engaged in dishonest conduct in closing the subject transactions. (767JA.) The majority's finding as to Westminster's dishonesty disregards the terms of the CPLs as written—and reasonably defined by the Court—and will lead to the inconsistent enforcement of similar CPL contracts.[63]

The Bank submitted funds and documents to Westminster with the expectation that the closing agent would not commit "fraud or dishonesty." In closing the Enid transaction, Westminster failed to follow First American's instructions regarding the disclosure of suspicious

[62] First American is not the only title insurer to issue such warnings to its issuing agents. See e.g., Attorneys' Title Guaranty Fund, Inc., Special Bulletin (October 2002), Chicago Title Insurance Company/Ticor Title Insurance Company/Security Union Title Insurance Company, Bulletin (August 12, 2002), Stewart Title Guaranty Company, Bulletin (July 20, 2005), and Old Republic National Title Insurance Company, Florida Bulletin (June 4, 1999) (all attached as ex 10); see also Wilburn, FLIP!" Not Just Another 4-Letter Word -- Illegal Flip Real Estate Transactions <https://www.alta.org/publications/titlenews/00/0004_04.cfm> (accessed January 28, 2015).

[63] Similar CPLs are at issue in two other appeals held in abeyance pending a decision by the Court in this case. *Bank of America, NA v Fidelity National Title Ins Co*, unpublished order of the Court of Appeals, issued August 6, 2014 (Docket No. 316538); *Bank of America, NA v Fidelity National Title Ins Co*, unpublished order of the Court of Appeals, issued August 6, 2014 (Docket Nos. 311798; 312426; 313797).

double escrows. It was only after the Bank's funds had been disbursed that Westminster provided the Bank with documents disclosing that the property had supposedly increased in value by $2.4 million in *one day*. (See 797JA-798JA.) Moreover, unapproved changes to the HUD-1 settlement statement indicate that Westminster knew that the borrower did not provide the required down payment to close the subject transaction. (905JA.) In closing the Heron Ridge transaction, Westminster failed to disclose the fact that the borrower made no down payment, or that closing funds came from a second mortgage and the fraudulent closing agent Patriot. (899JA.) The Bank further presented testimony from the borrower that everyone at closing was aware she was purchasing the Heron Ridge property as an investment—not a primary residence as represented to the Bank. (269JA.)

Under the majority's well reasoned definition of "fraud or dishonesty," the evidence for these closings (together with First American's underwriting alert and William Jaquinde's proffered expert testimony) creates a genuine issue of material fact regarding First American's liability under the CPLs for the Westminster closings. This evidence should be presented to the jury, and the majority clearly erred in finding that reasonable minds could not differ as to the conclusions to be drawn from this evidence. See *Bean*, p 34, n 12; *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 745; 419 NW2d 746 (1988) (state of mind is "hardly ever appropriate" for summary judgment). The majority's uneven application of its reasoning to First American's CPLs leaves the insurer free from liability for the losses arising from Westminster's suppression of material facts (today, such suppression would subject the closing agent to MCL 750.219d). This ruling ignores the plain language of the CPL contracts as written, and sets an alarming precedent favoring the professionals that facilitate mortgage fraud at the expense of lenders and borrowers who suffer the losses caused by this fraud. In practice, the majority has

advocated for a system in which a lender or borrower has no recourse under a CPL unless the closing agent admits to committing fraud or takes the Fifth Amendment to all questions regarding the closing. This decision is especially chilling when juxtaposed with the Court of Appeals' opinion that the full credit bid rule of *New Freedom* further limits a lender's right to pursue its mortgage fraud losses through civil litigation—regardless of the broad loss and causation language of the parties' contracts.

D. The full credit bid rule was developed to protect mortgagors—not to relieve third party wrongdoers like Defendants from liability unrelated to the secured debt.

The Bank (as mortgagee) foreclosed on the subject properties by advertisement—a process that has always been governed entirely by statute in Michigan. *Doyle v Howard*, 16 Mich 261, 264 (1867). Under the foreclosure by advertisement act (MCL 600.3201 *et seq.*), a mortgagee has the right to purchase the property securing its debt with a credit bid. MCL 600.3228; *Griffin v Union Guardian Trust Co*, 261 Mich 67, 69; 245 NW 572 (1933) (actual payment to the sheriff by mortgagee would be an "idle gesture"). After the mortgagee bids on the advertised property, the mortgagor, or any person claiming under the mortgagor, has a certain amount of time to redeem the property by paying the bid amount and required fees. MCL 600.3240. If the property is not redeemed, the mortgagee gets title to the property (subject to any prior liens). MCL 600.3236. But since no third party monies are received by the lender, the lender sustains the same actual monetary loss regardless of what it bids at the foreclosure sale. The mortgagee is permitted to seek a deficiency judgment against the mortgagor, or other person liable on the debt, but the mortgagor can defeat the deficiency judgment to the extent the mortgagor can show the amount bid was substantially less that the true value of the property. MCL 600.3280.

1. Michigan's anti-deficiency statute encourages full credit bids in order to bring certainty to the rights and liabilities of mortgagors and mortgagees.

Michigan's anti-deficiency statute provides that a "mortgagor, trustor or other maker of any such obligation, or any other person liable thereon" can defeat a deficiency judgment if it is shown that the property was "fairly worth" the amount of the debt secured or substantially more than the amount bid. See MCL 600.3280. The statute is clear in its intent to affect only the rights of mortgagees and mortgagors, and the statute has remained virtually unchanged since the Great Depression.[64] *Guardian Depositors Corp v Hebb*, 290 Mich 427, 430; 287 NW 796 (1939). At least one principal purpose of the statute was to prevent a mortgagee from obtaining a deficiency judgment and title to property of greater value than the amount of the debt secured by the mortgage.[65] *Bankers Trust Co v Rose*, 322 Mich 256; 33 NW2d 783 (1948).

A corollary of this anti-deficiency statute is that if a mortgagee bids the total debt (a full credit bid), the debt is discharged and there is no right of deficiency against the mortgagor. See *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555; 444 NW2d 217 (1989). The intent of the legislature was to force an election of remedies by a mortgagee concerning a single debt. See *Church & Church In. v A-1 Carpentry*, 281 Mich App 330, 340; 766 NW2d 30 (2008). One of the major reasons for this rule is to foster certainty as to the mortgagor's rights. See *Smith v General Mortgage Corp*, 402 Mich 125, 129; 261 NW2d 710 (1978). If a full credit bid is made, the mortgagee forfeits the right to pursue the mortgagor for a deficiency and avoids

[64] Like many states during the Great Depression, Michigan enacted this statute to protect the ever-growing number of defaulting home owners. See Comment, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 Ala L Rev 231, 239-240 (2005).

[65] A previous statute limited the mortgagee's right to seek a deficiency judgment to the balance of the debt remaining "unsatisfied" after the sale. *Winsor v Ludington*, 77 Mich 215, 219; 43 NW 866 (1889).

the need for a hearing or trial as to the "fair worth" of the property. See *Talmer Bank & Trust v Parikh*, 304 Mich App 373, *16, 21; 848 NW2d 408 (2014). And the mortgagor has the certainty of knowing that no deficiency judgment can be had. Both mortgagee and mortgagor benefit from full credit bids. See e.g., *Washington v Bac Home Loans Servicing, LP*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 2, 2013 (Docket No 12-12940) ("such bids actually help a borrower because in such situation the borrower 'is no longer liable for the debt'") (ex 11).

i. The Bank's full credit bids on the Kirkway and Enid properties did not reduce the Bank's losses.

The Bank made full credit bids on the Kirkway and Enid properties. (220JA) In bidding the full amount of the debt, the Bank merely decided that the best way to mitigate its losses for these loans was to forgo the right to collect any deficiency from the straw buyers and attempt to obtain marketable title to the collateral properties. Defendants did not contend that the Bank's bids were market bids, or that the Bank's bids prevented others from purchasing the properties, or that the properties were worth more than a fraction of the Bank's loaned funds. Defendants merely argued that they were relieved from their contractual responsibility because *New Freedom* extended the full credit bid rule beyond the mortgagors and "other persons liable" on the secured debt protected by the plain terms of MCL 600.3280.

2. *New Freedom's* extension of the protections provided to mortgagors by Michigan's anti-deficiency statute to shield third party wrongdoers is not a correct rule of law, and should be overruled by this Court.

In *New Freedom*, the Court of Appeals ruled that a full credit bid not only discharged a mortgagor's obligations under the secured debt, but it also barred recovery of losses against certain third party wrongdoers. *New Freedom*, 281 Mich App 63. For over a hundred years prior

to *New Freedom*, Michigan jurisprudence had applied the full credit bid rule (and MCL 600.3280) only to mortgagors and those having rights or liabilities under the secured debt being foreclosed.[66] *New Freedom* was the first Michigan court to apply the protections of the full credit bid rule to third parties not liable on the secured debt. The Court of Appeals expressed its hesitation about *New Freedom's* extension of this rule in its Prologue—noting that Defendants are not "persons liable" on the secured debt—but felt constrained to follow the previous panel's published holding in order to apply the full credit bid rule to the Bank's claims. (See 30JA, 39JA).

With no Michigan case law to rely on, the *New Freedom* panel relied largely on the Second Circuit's opinion in *Chrysler Capital Realty, Inc. v Grella,* 942 F2d 160 (2nd CA 1991) to make its new rule. *New Freedom*, 281 Mich App at 72 (finding the decision "persuasive"). In *Chrysler Capital Realty,* the Second Circuit Court of Appeals was asked to interpret Michigan law to determine whether a lender could pursue a fraud claim against a *borrower* after the lender had successfully bid the full amount of the debt. Although the language of the holding in *Chrysler Capital Realty* makes clear that the court was determining the rights among lenders/mortgagees and borrowers/mortgagors, *id.* at 163 ("[t]he…rule protects mortgagors…."), the court in *New Freedom* misconstrued *Chrysler Capital Realty* as support for the proposition that the full credit bid rule may be used to bar claims against non-borrower third parties. Had the court properly interpreted *Chrysler Capital*, it would have reached the opposite, and correct, result..[67]

[66] All of the Michigan cases cited in *New Freedom* involved deficiency actions against either borrowers or guarantors—cases that fall directly within the purview of MCL 600.3280.

[67] According to the *New Freedom* Court, *Chrysler Capital Realty* "supports the conclusion that the full credit bid rule bars fraud actions." *New Freedom*, Mich App at 74. But *Chrysler Capital Realty* only supports the conclusion that the full credit bid rule bars fraud actions *against the*

The *New Freedom* Court also relied heavily upon a series of California cases beginning with *Alliance Mortgage Co v Rothwell*, 10 Cal 4th 1226; 900 P2d 601, 615 (1995) to make its ultimate holding. *New Freedom*, 281 Mich App at 73-74. Interestingly, the *New Freedom* acknowledged that the court in *Alliance* "declined to apply the full credit bid rule to bar actions against nonborrower third parties." *Id.* at 73. The *Alliance* court expressly acknowledged that California's version of the "full credit bid rule was not intended to immunize wrongdoers from the consequences of their fraudulent acts." *Alliance*, 10 Cal 4th. at 1246-1247. And in *Alliance*, two justices suggested that the full credit bid rule should *never* apply to claims against third parties because such claims are not for the purposes of collecting against the secured debt.[68] *Id.* at 1254 (WERDEGAR, J., concurring). This is the more reasoned application of the full credit bid rule, and in line with MCL 600.3280 and Michigan case law before *New Freedom*.

Respectfully, the *New Freedom* Court missed the crucial distinction that Michigan's anti-deficiency law by its plain language was intended to protect borrowers, and was never intended to immunize wrongdoers from the consequences of their fraudulent or tortious conduct. As the dissent noted in this case, the full credit bid rule (and MCL 600.3280) was designed to protect borrowers and "should not work to the benefit of nonborrower third parties, especially where

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mortgagor. This is supported by the language of MCL 600.3280 which refers to an absolute defense for mortgagors that "shall defeat" the deficiency judgment.

[68] Since *Alliance*, California courts have consistently rejected the full credit bid rule as a bar to recovery against third-party non-borrowers. *New Freedom*, however, mistakenly overlooks all of this contrary authority and cites one case, *Pacific Inland Bank v Ainsworth*, 41 Cal App 4th 277; 48 Cal Rep 2d 489 (1995), for the proposition that "at least one California court after *Alliance* has applied the full credit bid to nonborrower third parties." *New Freedom*, 281 Mich App at 73. Not only was this case factually distinguishable from the claims in *New Freedom* (and the facts here), the *New Freedom* Court failed to address subsequent California cases that plainly rejected the finding of *Pacific Inland Bank*. See *Kolodge v Boyd*, 105 Cal Rptr 2d 749 (Cal App 1st Dist 2001) (application to third-party tortfeasors "simply irrational"); *First Commercial Mortgage Co v Reece*, 108 Cal Rptr 2d 23; 89 Cal App 4th 731, 744 (2001); *In re King Street Investments, Inc*, 219 BR 848 (9th Cir 1998).

[like here] fraud is involved." (39JA.) Michigan's foreclosure by advertisement system is governed entirely by statute, and there is simply no legislative evidence or justification (in MCL 600.3280 or otherwise) to support the extension of the full credit bid rule to shield third parties from civil liability unrelated to the discharged debt. By extending the full credit bid rule in such a broad and unexpected way, *New Freedom* judicially legislated a new rule. This new rule was contrary to long standing Michigan jurisprudence and the State's strong interest in combating mortgage fraud (as confirmed by the enactment of MCL 750.219d).

Mortgage fraud is a significant problem in Michigan, (Senate Legislative Analysis, SB 43, 249-252, HB 4462, 4478, 4492, January 18, 2012, p 1), and its perpetrators should not be absolved of civil liability just because the unrelated debt is extinguished. The Bank—which is slated to lose millions of dollars as a result of this unreasonable application of foreclosure law—is not the only one harmed by this unjust rule. Mortgagors will be harmed by *New Freedo*m's misapplication of the full credit bid rule because they will face greater uncertainty regarding potential deficiency judgments.[69] As recognized by the Michigan legislature, mortgage fraud can take years to discover. (*Id.* p 7.) If *New Freedom* remains the law, it will be in the best interests of mortgagees to avoid full credit bids (and to thereby preserve the right to pursue deficiency judgments against mortgagors) in case the mortgagee later discovers that it was the victim of mortgage fraud. As such, the *New Freedom* rule does not foster certainty as to mortgagor's rights—one of the guiding reasons for the rule in the first place. See *Smith*, 402 Mich at 129. The *New Freedom* rule also creates an incentive for mortgagees to seek recovery from unsophisticated borrowers rather than pursuing sophisticated real estate professionals or fraudsters liable to the mortgagee under contract (like CPLs and closing instructions) or tort law.

[69] The statute of limitations for actions founded upon covenants in mortgages of real estate is ten years. MCL 600.5807(4).

Respectfully, the Court should overrule *New Freedom* as clearly erroneous and allow the Bank to pursue Defendants for its actual losses. If MCL 600.3280 is to be extended to third parties, it should be done by the Legislature, not the Court of Appeals. Furthermore, the Bank's bids should be of no consequence as to the rights and liabilities between the Bank and Defendants. Because no third party monies were received by the Bank in connection with the foreclosure sales, it sustained the same actual loss regardless of what bids were made.[70] First American entered into contracts to reimburse the Bank for its actual losses arising from the fraud or dishonesty of its issuing agents. One of those agents, Westminster, entered into contracts accepting financial liability for losses resulting from its failure to follow the Bank's closing instructions. Defendants' liability under these contracts has nothing to do with the borrowers' liability under the secured debt as provided by Michigan statute. The Bank should be permitted to pursue its vested substantive rights to what is its due – recovery from Defendants of the Bank's entire losses. See *Rose*, 322 Mich at 261 ("one has a vested substantive right to what is his due").

i. In the alternative, this Court should give the new rule announced in *New Freedom* only prospective effect.

If the Court does not overrule *New Freedom*, it should in the alternative, give *New Freedom* only prospective effect. See *Bolt v City of Lansing*, 238 Mich App 37, 44; 604 NW2d 745 (1999). The Bank made its credit bids prior to the decision in *New Freedom* (220JA) and could not have anticipated that the Court of Appeals would create such a drastically new rule. In *Smith*, this Court was asked to apply the full credit bid rule to a new situation involving the rights

[70] Rather than relying on a legal fiction created to prevent mortgagees from receiving a double recovery against mortgagors, Defendants should instead be required to argue (and prove as an affirmative defense) that the Bank's credit bids somehow amounted to a failure to mitigate damages. See *Reinardy v Bruzzese*, 368 Mich 688, 691; 118 NW2d 952 (1962).

of insurance proceeds *between the mortgagor and mortgagee*. The Court ruled that the mortgagee's rights to the insurance proceeds were terminated by the full credit bid rule when the debt (which created the insurable interest in mortgagee) was extinguished. *Smith*, 402 Mich at 126-128. The *Smith* Court refused to apply the rule retroactively because it would be unfair in that case. *Id.* at 130. A similar result is even more appropriate in this case because the Bank's claims are completely independent of the secured debt and do not involve the rights and liabilities as between mortgagors and mortgagees.[71]

3. Assuming arguendo that the full credit bid rule of *New Freedom* is a correct rule of law, it should not be applied to this case.

The Court of Appeals in this case acknowledged that, in extending the full credit bid rule to certain third parties, the *New Freedom* Court did not hold that the rule applies to claims under CPLs—which by their plain language cover the lender's "actual loss incurred" and make no reference to damages.[72] (33JA, 38JA.) In fact, the title insurer in *New Freedom* itself appears to have conceded that the full credit bid rule was not applicable to the CPL claims against it. In the title insurer's brief on appeal, the title insurer stated that the:

> Trial Court correctly concluded that Plaintiff-Appellant "New Freedom suffered no loss from the closing agent's, [closing agent's], violation of the closing instructions." Based upon this analysis, *not an analysis of the full-credit-bid rule*, the Trial Court correctly held that Plaintiff-Appellant could not and did not suffer a recoverable loss under . . . the . . . closing protection letters.

[71] For this reason it is even more appropriate to reject Defendants' request to create a new rule that further limits the Bank's recoverable losses based on the Bank's *less* than full credit bids for Heron Ridge and Golf Ridge. (1181JA.) Such a rule would limit the Bank to less than ten percent of its $7,000,000 actual loss. Understanding that there is no Michigan authority for such a rule, the majority remained silent as to this issue—although Chief Judge Murphy noted that he would find that the Bank's recovery is not limited by the foreclosure bids on Heron Ridge and Golf Ridge. (39JA, n 1.)

[72] "Actual loss" under a CPL equals the total amount owed on the loan minus amounts actually received. See e.g., *JPMorgan Chase Bank, NA v First American Title Ins Co*, 750 F3d 573, 584 and *Property Transfer Services*, pp *55-56.

(1562JA.) Likewise, the Court in *New Freedom* did not apply the full credit bid rule to claims for breach of a lender's closing instructions[73]—which in this case refer to financial "loss." If the Court finds that the full credit bid rule announced by *New Freedom* is a correct rule of law (and it is to be applied retroactively) it should be applied narrowly and the terms of the parties' agreements (referring to financial loss—not the mortgage debt) should be enforced as written. See *Wilkie*, 469 Mich at 51-52. The Bank suffered the same financial loss regardless of the amount of its credit bids, and it should be able to seek recovery of these losses irrespective of the legal fiction created by *New Freedom*.

RELIEF SOUGHT

For the foregoing reasons, Plaintiff-Appellant Bank of America respectfully requests that this Honorable Court:

1. overrule *New Freedom* and reverse the holdings of the Court of Appeals' March 27, 2014 opinion per curiam as they relate to the full credit bid rule;

2. reverse Parts IV and V of the Court of Appeals' March 27, 2014 opinion per curiam;

3. remand to the circuit court accordingly; and

4. order such other relief that this Court deems equitable and just.

Respectfully submitted,

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January 28, 2015

[73] Separate claims for breach of the closing instructions were not before the *New Freedom* Court.

EXHIBIT
1

Stated Income Program

This document applies to
CRE Policy and Product Guide
Channel(s): LoanLine, Retail, Wholesale
Chapter(s): Program Guidelines

Publication Date: November 14, 2005
Effective Date: November 14, 2005
Effective Date: November 21, 2005

Program Summary

The Stated Income Program provides applicants with a strong credit and asset base the ability to obtain home loans with no income verification. The ratio calculation is based on income the applicant discloses on the application. It is designed to meet the needs of applicants who have demonstrated a high regard for their financial obligations as evidenced by a minimum credit bureau score.

Target Market

Applicants who have steady employment and complex sources of income or rapidly expanding incomes.

Available Channels

Refer to the table below for the available channels and sales regions for this program.

Bank of America Wholesale Sales Regions	Bank of America® Retail Sales Regions	Bank of America LoanLine™	Bank of America LoanSolutions®
• Eastern Bay Area (California) • Western Bay Area (California) • Florida • Great Lakes • Hawaii • Illinois • Mid-Atlantic • Midwest • Midsouth • New York • Los Angeles /	• Mid-Atlantic • Greater Florida • Los Angeles, Central California and Northern Nevada • Southeast (Carolinas) • Southeast (Georgia and North Florida) • Northern West Coast (Northern California)	• Direct • Relocation	• Not Available

Ventura • North Texas • Northeast • Northern California (Sacramento, Northern Nevada and Utah) • Northwest • South Los Angeles, Orange, Riverside and San Bernardino • South Texas, Arkansas, Louisiana and Mississippi • Southeast • Southwest • Upper Atlantic	• Pacific Southwest • Texas and New Mexico • Central Division • Northern West Coast (Washington, Oregon and Idaho) • Upstate and Metro New York • New England • Joint Venture		

Eligible Products / Programs (Conventional)

Refer to the table below for the eligible products / programs (conventional).

Eligible Products / Programs (Conventional)	Product Identification Codes
Eligible Products: • 15-Year Fixed Rate, Conforming and Nonconforming • 30-Year Fixed Rate, Conforming and Nonconforming • 3/1, 7/1, 10/1 Fully Amortized ARM, Nonconforming • 5 / 1 Fully Amortized ARM, Conforming with Conversion • 5 / 1 Fully Amortized ARM, Conforming and Nonconforming without Conversion • ManyOptions™ ARM Product • NET 3™, NET 5®, NET 7™ and 10 / 1 Initial Interest-Only Payment ARMs, Nonconforming without Conversion **Eligible Programs:** • Mortgage Rewards® Purchase Program • One-Time Close Program and Premier One-Time Close Program (refer to the One-Time Close Program and Premier One-Time Close Program sections in the Programs chapter in this Guide for parameters) ***Note:*** The One-Time Close Program and the Premier One-Time Close Program are not available to Bank of America Wholesale. • Special Jumbo Guidelines and Pricing Offer: Loans must be originated under the guidelines detailed in the Special Jumbo Guidelines and Pricing Offer section in the Programs chapter of this Guide. • Yale First Mortgage Discount Program	Refer to the Appendix for a list of current Loan Plan Codes. ***Note***: The loan plan codes for this program indicate "Stated Income" in the Program column of the Loan Plan Code section.

Program Features

Refer to the table below for program features.

Program Features	
Maturity and amortization term	• Refer to underlying product.
Assumability	• Refer to underlying product.
Prepayment pricing	• Not available
Prepayment fee	• Not applicable
Borrowers Protection Plan® (BPP)	• Loans originated under the Stated Income Program are eligible for the Borrowers Protection Plan® (BPP) offer.
Buyer Ready® Loan Program	• Loans originated under the Stated Income Program are eligible for the Buyer Ready® Loan Program.

Bank of America® Second Mortgage Products	• Loans originated under the Stated Income Program are eligible for the Stated Income Second Mortgage Program (fixed rate and balloon). Refer to the Stated Income Second Mortgage Program section in the Programs chapter of this Guide for parameters.
Equity Maximizer Combo™	• Fixed Rate and Fully Amortized ARM loans originated under the Stated Income Program are eligible for the Equity Maximizer Combo™ product (refer to the Equity Maximizer Combo™ section in the Product Guidelines chapter of this Guide for parameters). • Initial Interest-Only ARM loans and ManyOptions™ ARM loans originated under the Stated Income Program are ineligible for the Equity Maximizer Combo™ product.
Prequalified Bank of America Equity Maximizer®	• Loans originated under the Stated Income Program are ineligible for the Prequalified Bank of America Equity Maximizer® product.
All-Ready Home Refinance Program	• Loans originated under the Stated Income Program are ineligible for the All-Ready Home Refinance Program.

Adjustable Rate Features

Refer to the table below for the adjustable rate features.

Adjustable Rate Features	
Index	• Refer to underlying product
Margin	• Refer to the Rate Sheet
Periodic cap	• Refer to underlying product
Life cap	• Refer to the Rate Sheet
Interest rate calculation	• Refer to underlying product
Interest rate adjustment periods	• Refer to underlying product
Payment adjustment dates	• Refer to underlying product
Conversion option	• Available only on conforming 5 / 1 Fully Amortized ARM

Loan to Value (LTV) Ratios and Maximum Loan Amounts – Conforming Fixed Rate and 5/1 Fully Amortized ARM

Refer to the table below for the LTVs and maximum loan amounts – Conforming Fixed Rate and 5/1 Fully Amortized ARMs.

Notes:

- Refer to Rate Sheet and / or Quick Quote for any add-ons to rate and / or price.
- Although three- and four-unit properties are only reflected in the Nonconforming LTV and Maximum Loan Amounts table, both conforming and nonconforming loan amounts are available for three- to four-unit properties within the Stated Income Program. However, the nonconforming loan plan code must be used for all loan amounts for three- to four-unit properties and the underwriting and pricing guidelines for conventional nonconforming loans must be followed.

Property Type	Minimum Credit Score	LTV	CLTV	Maximum Loan Amounts		Footnotes
				Continental U.S.	AK and HI	
Conforming – Fixed Rate and 5 / 1 Fully Amortized ARM Purchase and Rate/Term Refinance (Limited Cash-Out)						
Owner-occupied, primary residence						
1-unit	680	90%	90%	$359,650	$539,475	--
2-unit	680	90%	90%	$460,400	$690,600	--
Condominium / PUD / log home	(Same as 1-unit above)					
Second home						
1-unit	680	80%	80%	$359,650	$539,475	--
Condominium / PUD / log home	(Same as 1-unit above)					
Non-owner occupied						

1-unit	700	80%	80%	$359,650	$539,475	--
1-unit	680	70%	70%	$359,650	$539,475	--
2-unit	700	80%	80%	$460,400	$690,600	--
2-unit	680	70%	70%	$460,400	$690,600	--
Condominium / PUD / log home	(Same as 1-unit above)					

Property Type	Minimum Credit Score	LTV	CLTV	Maximum Loan Amounts		Maximum Cash-out	Footnotes
				Continental U.S.	AK and HI		
Conforming – Fixed Rate and 5 / 1 Fully Amortized ARM Cash-Out Refinance							
Owner-occupied, primary residence							
1-unit	680	80%	80%	$359,650	$539,475	$75,000	--
1-unit	680	75%	75%	$359,650	$539,475	$100,000	--
2-unit	680	80%	80%	$460,400	$690,600	$75,000	--
2-unit	680	75%	75%	$460,400	$690,600	$100,000	--
Condominium / PUD / log home	(Same as 1-unit above)						
Second home							
1-unit	700	75%	75%	$359,650	$539,475	$75,000	--
1-unit	680	70%	70%	$359,650	$539,475	$75,000	--
Condominium / PUD / log home	(Same as 1-unit above)						
Non-owner occupied							
1-unit	700	70%	70%	$359,650	$539,475	$75,000	--
2-unit	700	70%	70%	$460,400	$690,600	$75,000	--
Condominium / PUD / log home	(Same as 1-unit above)						

Loan to Value (LTV) Ratios and Maximum Loan Amounts – Nonconforming Fixed Rate and Fully Amortized ARMs

Refer to the table below for the LTVs and maximum loan amounts for Nonconforming Fixed Rate and Fully Amortized ARMs.

Notes:

Refer to Rate Sheet and / or Quick Quote for any add-ons to rate and / or price.

Both conforming and nonconforming loan amounts are available for three- to four-unit properties within the Stated Income Program. However, the nonconforming loan plan code must be used for all loan amounts for three- to four-unit properties and the underwriting and pricing guidelines for conventional nonconforming loans must be followed.

Property Type	Minimum Credit Score	LTV	CLTV	Maximum Loan Amounts	Footnotes
Nonconforming – Fixed Rate and Fully Amortized ARMs Purchase and Rate / Term Refinance					
Owner-occupied					
Standard Parameters					
1-2 units	680	95 %	95 %	$400,000	--
1-2 units	620	90%	90%	$400,000	2
1-2 units	660	90 %	90%	$650,000	2
1-2 units	620	75%	75%	$650,000	2
1-2 units	660	75 %	90 %	$1,000,000	2
1- unit	700	75 %	75 %	$1,500,000	--
1-2 units	680	70%	70%	$1,500,000	--
1-2 units	740	70%	70%	$3,000,000	--
3-4 units	680	90 %	90 %	$650,000	--
3-4 units	620	75 %	75 %	$650,000	--
3-4 units	680	75 %	90 %	$1,000,000	--

3-4 units	680	70%	70%	$1,500,000	--
Condominium / PUD / Log home	(Same as 1-unit)				
Cooperative	680	80%	N/A	$500,000	--
Cooperative	680	75%	N/A	$650,000	--
Cooperative	680	70%	N/A	$750,000	--
Cooperative	680	65%	N/A	$1,000,000	--
Expanded Parameters					
Cooperative	740	80%	N/A	$750,000	1
Cooperative	740	75%	N/A	$1,000,000	1
Cooperative	740	70%	N/A	$1,250,000	1
Cooperative	740	65%	N/A	$1,500,000	1
Second homes					
1-unit	660	90 %	90 %	$400,000	2
1-unit	620	70 %	80%	$400,000	2
1-unit	660	80%	80%	$650,000	2
1-unit	620	65%	80%	$650,000	2
1-unit	660	75%	75%	$750,000	2
1-unit	720	75%	75%	$1,000,000	3
1-unit	720	70%	70%	$1,500,000	3
1-unit	740	65%	70%	$3,000,000	3
Condominium / PUD / Log home	(Same as 1-unit)				
Cooperative	680	75%	N/A	$400,000	--
Cooperative	680	65%	N/A	$650,000	--
Non-owner occupied					
1-2 units	660	80 %	80%	$650,000	2
1-2 units	660	75 %	75 %	$1,000,000	2
1-2 units	680	70%	70%	$1,500,000	--
3-4 units	660	75 %	75 %	$1,000,000	--
3-4 units	680	70 %	70 %	$1,500,000	--
Condominium / PUD / Log home	(Same as 1-unit)				

[1] **Expanded parameters:** All applicants are required to have a minimum credit bureau score of 740 and 12 months' reserves.

[2] Requires 680 minimum credit bureau score for high-rise condominiums (more than four stories).

[3] Second homes over $750,000 must be located in a market area where nonconforming second homes are typical. Refer to Property location in this section for additional information.

Property Type	Minimum Credit Score	LTV	CLTV	Maximum Loan Amounts	Maximum Cash-Out	Footnotes
Nonconforming – Fixed Rate and Fully Amortized ARMs Cash-out Refinance						
Owner-occupied						
1-2 units	660	90 %	90%	$400,000	$325,000	1
1-2 units	620	75%	75 %	$400,000	$325,000	1
1-2 units	660	80 %	90 %	$650,000	$325,000	1
1-2 units	620	70 %	70 %	$650,000	$500,000	1
1-2 units	660	75%	75%	$1,000,000	$500,000	1
1-2 units	680	70%	70%	$1,500,000	$500,000	--
1-2 units	740	60%	70%	$3,000,000	$500,000	--
3-4 units	680	90 %	90 %	$400,000	$325,000	--
3-4 units	620	75 %	75 %	$400,000	$325,000	--
3-4 units	660	75 %	75 %	$1,000,000	$500,000	--
3-4 units	680	70 %	70 %	$1,500,000	$500,000	--

Condominium / PUD / Log home	(Same as 1-unit)					
Cooperative	680	80%	N/A	$500,000	$100,000	--
Cooperative	680	75%	N/A	$650,000	$100,000	--
Cooperative	720	65%	N/A	$750,000	$200,000	--
Cooperative	720	55%	N/A	$1,000,000	$250,000	--
Second homes						
1-unit	660	80 %	90 %	$400,000	$325,000	1
1-unit	620	75 %	75 %	$400,000	$325,000	1
1-unit	660	75%	75%	$750,000	$500,000	1
1-unit	720	75 %	75 %	$1,000,000	$500,000	2
1-unit	720	70%	70%	$1,500,000	$500,000	2
1-unit	740	60%	70%	$3,000,000	$500,000	2
Condominium / PUD / Log home	(Same as 1-unit)					
Non-owner occupied						
1-2 units	680	75 %	75 %	$1,000,000	$325,000	--
1-2 units	680	70 %	70 %	$1,500,000	$325,000	--
3-4 units	680	75 %	75 %	$400,000	$325,000	--
3-4 units	680	70 %	70 %	$650,000	$325,000	--
3-4 units	680	45%	65%	$1,000,000	$325,000	--
Condominium / PUD / Log home	(Same as 1-unit)					

[1] Requires 680 minimum credit bureau score for high-rise condominiums (more than four stories).
[2] Second homes over $750,000 must be located in a market area where nonconforming second homes are typical. Refer to "Property location" in this section for additional information.

Loan to Value (LTV) Ratios and Maximum Loan Amounts – Initial Interest-Only Payment ARMs and ManyOptions™ ARM

Refer to the table below for the LTVs and maximum loan amounts -- Initial Interest-Only Payment ARMs and ManyOptions™ ARM.

Notes:

Refer to Rate Sheet and / or Quick Quote for any add-ons to rate and / or price.

Both conforming and nonconforming loan amounts are available for three- to four-unit properties within the Stated Income Program. However, the nonconforming loan plan code must be used for all loan amounts for three- to four-unit properties and the underwriting and pricing guidelines for conventional nonconforming loans must be followed.

Property Type	Minimum Credit Score	LTV	CLTV	Maximum Loan Amounts	Footnotes
Nonconforming –					

Initial Interest-Only Payment ARMs and ManyOptions™ ARM Purchase and Rate / Term Refinance					
Owner-occupied					
Standard Parameters					
1-unit	680	85%	90%	$400,000	--
1-unit	680	80%	90%	$500,000	--
1-unit	680	75%	90%	$650,000	--
1-unit	680	70%	80%	$750,000	--
1-unit	680	65%	70%	$1,000,000	--
2-units	680	85%	90%	$400,000	--
2-units	680	80%	90%	$500,000	--
2-units	680	75%	75%	$650,000	--
2-units	680	70%	70%	$750,000	--
2-units	680	65%	70%	$1,000,000	--
3-4 units	680	75%	80%	$400,000	--
3-4 units	680	70%	80%	$500,000	--
3-4 units	680	65%	80%	$650,000	--
3-4 units	680	55%	60%	$1,000,000	--
Condominium / PUD / Log home	(Same as 1-unit)				
Cooperative	680	80%	N/A	$500,000	3
Cooperative	680	75%	N/A	$650,000	3
Cooperative	680	70%	N/A	$750,000	3
Cooperative	680	65%	N/A	$1,000,000	3
Expanded Parameters					
1-unit	740	80%	80%	$750,000	1
1-unit	740	75%	80%	$1,000,000	1
1-unit	740	70%	70%	$1,250,000	1, 2
1-unit	740	65%	65%	$1,500,000	1, 2
Condominium / PUD / Log home	(Same as 1-unit)				
Cooperative	740	80%	N/A	$750,000	1, 3
Cooperative	740	75%	N/A	$1,000,000	1, 3
Cooperative	740	70%	N/A	$1,250,000	1, 3
Cooperative	740	65%	N/A	$1,500,000	1, 3
Second homes					
1-unit	680	75%	80%	$400,000	--
1-unit	680	65%	80%	$650,000	--
Condominium / PUD / Log home	(Same as 1-unit)				
Cooperative	680	75%	N/A	$400,000	3
Cooperative	680	65%	N/A	$650,000	3
Non-owner occupied					
1-unit	680	75%	80%	$400,000	--
1-unit	680	65%	80%	$650,000	--
2-units	680	75%	80%	$400,000	--
2-units	680	65%	75%	$650,000	--
3-4 units	680	65%	65%	$400,000	--
3-4 units	680	55%	65%	$650,000	--
Condominium / PUD / Log home	(Same as 1-unit)				

[1] **Expanded parameters**: All applicants are required to have a minimum credit bureau score of 740 and 12 months' reserves.

[2] Low or high-rise condominiums: Maximum loan amount is $1,000,000 for loans under ManyOptions™ ARM product.

[3] Cooperatives are not available on ManyOptions™ ARM

Property Type	Minimum Credit Score	LTV	CLTV	Maximum Loan Amounts	Maximum Cash-Out	Footnotes
Nonconforming – Initial Interest-Only Payment ARMs and ManyOptions™ ARM Cash-out Refinance						
Owner-occupied						
1-unit	680	80%	90%	$500,000	$100,000	--
1-unit	680	75%	80%	$650,000	$100,000	--
1-unit	720	65%	70%	$750,000	$200,000	--
1-unit	720	55%	60%	$1,000,000	$250,000	--
2 units	680	75%	75%	$500,000	$100,000	--
2 units	680	70%	70%	$650,000	$100,000	--
Condominium / PUD / Log home	(Same as 1-unit)					
Cooperative	680	80%	N/A	$500,000	$100,000	1
Cooperative	680	75%	N/A	$650,000	$100,000	1
Cooperative	720	65%	N/A	$750,000	$200,000	1
Cooperative	720	55%	N/A	$1,000,000	$250,000	1
Second homes						
1-unit	680	70%	70%	$400,000	$100,000	--
1-unit	680	65%	65%	$650,000	$100,000	--
1-unit	720	60%	60%	$650,000	$150,000	--
Condominium / PUD / Log home	(Same as 1-unit)					

[1] Cooperatives are not available on ManyOptions™ ARM

Program Parameters Refer to the table below for the program parameters.

Program Parameters	
Minimum loan amount	• $5,000 ***Note:*** Conforming loan amounts are allowed, but must use nonconforming loan plan codes and nonconforming pricing for the following products under the Stated Income Program: • 3/1, 7/1 and 10/1 Fully Amortized ARM • NET 3™, NET 5®, NET 7™ and 10 / 1 Initial Interest-Only Payment ARM • ManyOptions™ ARM
Occupancy types	• Owner-occupied primary residence • Second homes (not allowed for Stated Income Program loans originated in conjunction with the Equity Maximizer Combo product) • Non-owner occupied ***Note:*** Non-owner occupied properties are not eligible under the Equity Maximizer Combo™ product.
Purpose types	• Purchase • Rate / term refinance (limited cash-out) – conforming • Rate / term refinance – nonconforming • Cash-out refinance ***Note:*** Cash-out refinance not allowed on non-owner occupied properties under nonconforming 5/1 Fully Amortized ARM. Also not allowed in Texas for owner-occupied properties. Refer to the Texas Equity Loan Program section.
Eligible property types	• One-unit detached properties (site built) • One-unit attached properties (such as townhouses and row houses) • Low- or high-rise condominiums (refer to the Condominiums, Cooperatives and Planned Unit Developments (PUDs) section of the Underwriting Guidelines

	chapter of this Guide for eligibility requirements.) • Cooperatives (restricted to areas where cooperatives are common within Connecticut, Florida, Illinois, Maryland, Massachusetts, New Jersey, New York, Virginia and Washington, D.C.. Refer to the Condominiums, Cooperatives and Planned Unit Developments (PUDs) section of the Underwriting Guidelines chapter of this Guide for eligibility requirements.) • Two- to four-unit properties • Log homes • Modular / Prefabricated homes
Ineligible property types	• Condominium hotels • Lots • Manufactured homes • Mixed-use properties • Unique properties (such as earth homes, dome homes and so forth)
Eligible applicants	• U.S. citizens • Permanent resident aliens • Nonpermanent resident aliens o Use the nonconforming loan products guidelines for nonpermanent resident aliens only (regardless of the loan amount – conforming or nonconforming) as found in Residency Status in the General Eligibility Issues section of the Underwriting Guidelines chapter of this Guide. • Trustees of living trust
Ineligible applicants	• Nonoccupant co-mortgagor • Corporations • Partnerships • Nonresident aliens
Rate / term refinance	• Refer to Refinances in the General Eligibility Issues section of the Underwriting Guidelines chapter of this Guide for qualifications and documentation requirements.
Cash-out	• Refer to the LTV and Maximum Loan Amount table in this section for maximum cash-out limits. • Removal of equity for an applicant's business is not allowed. ***Note:*** Not allowed in Texas for owner-occupied properties. Refer to the Texas Equity Loan Program section.
Buydown options	• Temporary buydowns allowed • 2/1 or 1/1 plans are acceptable • Temporary buydowns qualify at the second year rate • Lender-paid buydowns are not allowed • Buydowns not allowed with NET 3™, NET 5®, NET 7™ and 10/1 Initial Interest-Only Payment ARM products and ManyOptions™ ARMs.
Rate locks	• ARM Plus not available with ARM loans
Program / promotion restrictions	• Not available with any special programs or promotions, such as but not limited to: Home Loan Value (prepayment pricing), Neighborhood Advantage®, Purchase Plus or Refinance Plus™ and Mortgage Credit Accommodation Program. • Loans that do not meet PaperSaver® requirements and receive Capstone's conditions of income and asset verifications cannot be resubmitted for the Stated Income Program.

Underwriting Criteria Refer to the table below for the underwriting criteria.

Underwriting Criteria	
Qualifying rate	• Refer to underlying product. • Loans with a temporary buydown qualify at the second year rate
Documentation types	• No documentation of income is allowed except what is stated by the applicant on the application. Income must be included on the initial application but is not verified. Income **cannot** be added after the initial application is accepted. ***Note:*** If income information is added after the initial application is accepted, the loan will not be eligible for the Stated Income Program and the applicant may receive a counteroffer for another product or program.

	• Assets can be verified with full or alternative documentation. ***Note:*** Enter **6** in the **Doc Type** field and **O** in the **UW Process Code** field on the Loan Production System (LPS).
Property location	• All states • Second homes: o Second home loans over $750,000 are available in the following select markets: Monterey, Napa, Palm Springs, Rancho Mirage, La Quinta, Lake Tahoe, Las Vegas, Seaside, Salt Lake City, Sun Valley, Treasure Coasts, Naples, Miami, Hilton Head, Charleston, Outer Banks, Bar Harbor, the Hamptons, Cape Cod, Martha's Vineyard, coastal areas o If the property is not located in one of these defined areas, the appraisal must reflect "nonconforming" second homes are typical for this market area.
Mortgage insurance	• All loans with LTV ratios above 80% require mortgage insurance (refer to the Insurance chapter of this Guide for complete requirements and a list of approved mortgage insurance providers). • Standard coverage determined by LTV and term with a 14 basis point add-on.
Financed mortgage insurance (MI)	Financed mortgage insurance (MI) allowed, except on ManyOptions™ ARMs and NET 3™, NET 5®, NET 7™ and 10/1 Initial Interest-Only Payment ARMs. • Mortgage insurance may be financed subject to loan amount, LTV limitations and property type (refer to the Insurance chapter of this Guide for complete requirements). • Mortgage insurance cannot be financed on loans with a base LTV exceeding 90%. • Loan is limited to a maximum LTV of 95% including any financed mortgage insurance premium.
	• Income is stated on the application but not verified. • Salaried applicants must have a minimum of two years of continuous employment with the same employer or in the same line of work. • A verbal verification of employment confirming the following is required: o Applicant's date of employment o Applicant's employment status and job title o Name, telephone number and title of the person that verified the information. o Name and title of the person making the call • **Bank of America Wholesale:** Income is stated at the time of loan submission on the **signed** application but is **not verified**. Income stated on an unsigned application will not be considered in underwriting the loan.

Current employment and income requirements: Salaried	
Current employment and income requirements: Self-employed	• Require a signed *Internal Revenue Service (IRS) Request for Transcript of Tax Return (Form 4506-T) (VMP-9045T)* at submission (no exceptions). • Income is stated on the application but is not verified. • Applicants who have been self-employed for less than two years but for more than one year must have a two-year history of previous successful employment in the same occupation (or a related field) in order to be eligible for financing. • Verification of the existence of the applicant's business is required through evidence of the following: o A business license and confirmation of a telephone directory listing. o If a license is not required for the business, a signed confirmation of business is required by the applicant's accountant or CPA. o If a business telephone number is not used, alternative documentation can be provided by a third party. A signed confirmation from the applicant's accountant or verbal verification is acceptable. A print out of a Web site page from a local or state business regulatory or registration office or a trade organization is also acceptable. • **Bank of America Wholesale**: Income is stated at the time of loan submission on the **signed** application but is **not verified**. Income stated on an unsigned application will not be considered in underwriting the loan.
Current employment and income requirements: Commissioned income more than 25%	• Income is stated on the application but is not verified. • Minimum of two years of continuous employment with the same employer or in the same line of work. • A verbal verification of employment is required to confirm the following: o The applicant's date of employment o The applicant's employment status and job title o Name, telephone number and title of the person that verified the information. o Name and title of the person that made the call. • **Bank of America Wholesale**: Income is stated at the time of loan submission on the **signed** application but is **not verified**. Income stated on an unsigned application will not be considered in underwriting the loan.
Alimony and / or child support; rental income; trust income; note income; inheritance and guaranteed income; other income	• Require a signed *IRS Request for Transcript of Tax Return (Form 4506-T) (VMP-9045T)* at submission (no exceptions). • Applicants who have recently retired are eligible if they provide documentation that verifies a two-year continuous employment history and current retirement status. • Applicant must have a two-year continuous history. If a two-year continuous history cannot be verified, the applicant is not eligible for this program. • Income is stated on the application if needed to qualify, but amounts are not verified. **Business Tax Returns:** • Not required
Secondary financing	• Refer to the LTVs and Maximum Loan Amount table in this section for combined loan-to-value (CLTV) maximum. • ManyOptions™ ARM loans: Bank of America second mortgages (new or existing) are not allowed.
Down payment requirements	• Minimum down payment must come from the applicant's own funds. The minimum down payment is equal to the full amount to meet the LTV requirement. Any excess down payment over and above the minimum required can come from gift funds, other assets, and so forth. • Cash-out from subject property cannot be counted toward required funds amount.
Asset verification	• Documentation is necessary only for those assets needed for down payment, closing costs and cash reserves. • Bank Deposits - Most recent two months bank statement or Verification of Deposit. • Depository Stocks / Bonds - Most recent account statement or

	verification of deposit. • Sale of Home - Evidence sale with HUD-1 Settlement Statement or another closing document if final HUD-1 is not available. • Retirement Accounts - One most recent statement, no proof of liquidation required. • Sale of Assets (nonreal estate / nonsecurities): If assets are needed for down payment and closing costs, obtain proof of proceeds.
Gift funds	• Gifts over and above the minimum amount required are acceptable. • Gift funds must come from an immediate family member (verification of funds from the family member's account is not required). • Obtain a gift letter to determine the family relationship. • Verify receipt of funds in applicant's account.
Required cash reserves	**Fixed Rate and Fully Amortized ARMs:** • Conforming loan amounts o Two months principal, interest, tax and insurance (PITI) required on primary residences and second home loans. o Six months PITI required on investment property loans • Nonconforming loan amounts o Six months PITI required for primary residence, second home and investment property loans, **or** o No reserves required if applicant has at least a $50,000 equity investment in the subject property. o Loans over $1 million – 6 months PITI • Expanded Parameters: 12 months' PITI reserves required (no exceptions) **NET 3™, NET 5®, NET 7™ and 10/1 Initial Interest-Only Payment ARMs and ManyOptions™ ARMs:** • Six months PITI reserves required • Expanded Parameters: 12 months' PITI reserves required (no exceptions)
Qualifying debt-to-income ratios	**NET 3™, NET 5®, NET 7™ and 10/1 Initial Interest-Only Payment ARMs** must meet the following ratio requirements: • 45% / 45% if the TLTV is 70.00% or less • 45% / 45% if the TLTV is 70.01% to 80.00% with a credit bureau score of 720 or more • 40% / 40% if the TLTV is 70.01% to 80.00% with a credit bureau score of 680 to 719 **ManyOptions™ ARM Product** must meet the following ratio requirements: • Owner Occupied or Second Home – 1 Unit o For Loans with TLTVs of 70.00% or less: ▪ Maximum debt-to income (DTI) ratio of 45.00 o For Loans with TLTVs 70.01- 90.00% ▪ Maximum DTI ratio of 45.00% if the credit bureau score is 720 or more. ▪ Maximum DTI ratio of 45.00% if the credit bureau score is 680 to 719 and the applicant has 12 months or more of verified PITI in reserves after closing. ▪ Maximum DTI ratio of 40.00% if the credit bureau score is 680 to 719 and the applicant has less than 12 months of verified PITI in reserves after closing. • Two- to four-units and Investment Properties o Maximum DTI allowed is 36% **Fixed Rate and Fully Amortized ARMs:** Standard qualifying debt-to-income ratio requirements apply (refer to Qualifying Debt-to Income Ratios in the General Eligibility Issues section of the Underwriting Guidelines chapter of this Guide).
Prior home PITI and bridge loan payment	• Include in debt-to-income ratio or document that the employer / relocation plan takes responsibility for outstanding mortgage.
Contributions	• Maximum allowed percentage based on the lesser of the sales or appraised value: o Owner-occupied primary residence: 6% o Second home: 3% o Non-owner occupied: 3%

Bank of America® Retail and Bank of America LoanLine™:

- A walk-in appraisal is required
- Standard appraisal requirements apply as referenced in the Property and Appraisals section of the Underwriting Guidelines chapter of this Guide. All appraisals must be ordered through the Loan Center.

Bank of America Wholesale:

- A walk-in appraisal is required
- Standard appraisal requirements apply as referenced in the Property and Appraisals section of the Underwriting Guidelines chapter of this Guide. Bank of America is required to review and approve appraisal(s).

Appraisal requirements	
Underwriting differences	• Bank of America will not fund more than one loan in the NET 3™, NET 5®, NET 7™ and 10/1 Initial Interest-Only Payment ARM (Conventional) loan group to any individual in a 60-day period (LotLoan NET 3™ and NET 5® are **not** counted when determining how many Initial Interest-Only Payment ARM loans have been granted to an individual in a 60-day period). If the subject property is an investment property transaction, the loan must also meet the Property Ownership Limits outlined in the General Eligibility Issues section of the Underwriting Guidelines chapter of this Guide.
Credit history	• The valid credit bureau report must contain five or more tradelines (open or closed). Joint tradeline accounts may be counted towards both the applicant's and co applicant's minimum number of tradelines. The oldest tradeline (open or closed) reflected on the valid credit bureau report must have been opened for at least two years. • The valid credit bureau report and credit bureau score must be dated within 120 days of the note date.
Minimum credit bureau score	• The minimum credit bureau score varies based on occupancy, purpose and LTV. Refer to the LTV and Maximum Loan Amounts table in this section for specifics. • Select the credit bureau score for each applicant using one of the following methods: o The lower score of two repositories o The middle score of three repositories • The lowest selected credit bureau score among all applicants is used. • Second homes: Loans over $750,000 require a 720 credit bureau score for the primary applicant. The 720 credit bureau score is also required if the combined loan amount for Bank of America first mortgage and second mortgage products exceeds $750,000. ***Note:*** Bank of America is unable to verify the primary applicant, since the primary applicant is defined as the applicant with the highest verified income. The Stated Income Program is a "no income verification" program, so all credit bureau scores are considered and the lowest score is used to qualify. If one applicant does not have a credit bureau score or does not meet the minimum credit bureau score requirement, the Stated Income Program request will be declined.
Delinquencies – nonmortgage	• No delinquencies of 30 days or more during the prior 12 months.
Mortgage / rental history	• 0 x 30 past 12 months • 0 x 60 plus for past 24 months • When mortgage / rental history appears on the valid credit bureau report, direct verification is not required • When mortgage / rental history does not appear on the valid credit bureau report, it must be verified for the previous 12 months o Obtain the current balance, current status and monthly payment amount o Rental history may be established with canceled checks
Major adverse credit tax liens?	• None allowed in the past 24 months • Major adverse credit includes: o Collection accounts o Charged off accounts o Settled accounts o Judgment liens o Repossessions o Garnishments o Accounts showing 90-day delinquency or worse o Derogatory public record items ***Note:*** Excludes medical collections of less than $500.
Bankruptcies and foreclosures	• No previous history allowed
Contingent mortgage debt	• Further verification is not required for accounts listed on applications, but not appearing on a valid credit bureau report. However, payments should be considered in debt-to-income ratio calculations.

Inquiries	• Not required to determine if new credit was granted or to obtain an explanation for inquiries.
Underwriting exceptions	• None allowed

Required Documents

- Refer to underlying product guidelines.

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EXHIBIT
2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-1 THOMAS KELLER,

Defendant.
_____/

VIO: 18 U.S.C. §1344

INFORMATION

The United States Attorney Charges:

GENERAL ALLEGATIONS

At all times pertinent to this Information:

1. "Michigan Land Development, LLC" (MLD) purported to be a real estate investment company doing business in the State of Michigan.

2. MLD was operated by **THOMAS KELL**ER(D-1), who used it to facilitate the purchase and sale of properties using fraudulently inflated appraised values and false buyer asset and income information.

3. **"Straw Buyer"** refers to an individual who, willingly or by trick, is enticed to pretend to be a legitimate purchaser of property. These individuals

generally have good credit, but not enough income to purchase the property.

4. "Bank of America" was a financial institution doing business in the Eastern District of Michigan and elsewhere, whose deposits were insured by the Federal Deposit Insurance Corporation.

COUNT ONE
(18 U.S.C. §1344 -- Bank Fraud)

D-1 THOMAS KELLER

5. The **General Allegations** are included in this count.

6. From in or about December 2005, through in or about January 2006, in the Eastern District of Michigan, Southern Division, defendant **THOMAS KELLER** (D-1), knowingly executed a scheme to defraud Bank of America, and to obtain money and funds owned by and under the control of Bank of America by means of materially false and fraudulent pretenses and representations.

7. As part of this scheme, the defendant, did the following:

A. In December 2005, **THOMAS KELLER** (D-1), recruited a straw buyer to purchase the property located at 9430 Highland Court in Davison, Michigan. (Highland Court)

B. On January 11, 2006, **THOMAS KELLER** (D-1), used MLD to purchase the Highland Court property for $548,000.

B. Also on January 11, 2006, **THOMAS KELLER** (D-1), facilitated the sale of Highland Court from MLD to the straw buyer for $1,150,000.

C. The purchase of Highland Court by the straw buyer resulted from the submission of a materially false and fraudulent loan application to Bank of America. The application, as **THOMAS KELLER** (D-1) knew and intended, included grossly inflated asset and income information for the straw buyer as well as a fraudulently inflated appraisal for Highland Court.

D. It was part of the scheme to defraud that Bank of America relied on the materially false and fraudulent information in approving and disbursing the loan.

E. After the loan was disbursed, payments were not made in accordance with the mortgage loan agreement and the property was foreclosed on, resulting in a loss to Bank of America of $685,000; all in violation of Title 18,United States Code, Section 1344.

BARBARA L. McQUADE
United States Attorney

KAREN L. REYNOLDS
Assistant United States Attorney

Dated: September 14, 2010

United States District Court Eastern District of Michigan	**Criminal Case Cc**

Case:2:10-cr-20547
Judge: Murphy, Stephen J
MJ: Morgan, Virginia M
Filed: 09-14-2010 At 04:24 PM
INFO USA V THOMAS KELLER (LG)

NOTE: It is the responsibility of the Assistant U.S. Attorney signing this form to cc

Reassignment/Recusal Information This matter was opened in the USAO prior to August 15, 2008 [ ]

Companion Case Information	**Companion Case Number:**
This may be a companion case based upon **LCrR 57.10 (b)(4)[1]:**	**Judge Assigned:**
☐ **Yes** x ☐ **No**	**AUSA's Initials:** KLR

Case Title: USA v. D-1 THOMAS KELLER

County where offense occurred : Genesee

Check One: x☐ **Felony** ☐ **Misdemeanor** ☐ **Petty**

____Indictment/__x__Information --- **no** prior complaint.
____Indictment/____Information --- based upon prior complaint [**Case number:**]
____Indictment/____Information --- based upon **LCrR 57.10 (d)** ***[Complete Superseding section below]***.

Superseding Case Information

Superseding to Case No: _____ **Judge:** _____

☐ Original case was terminated; no additional charges or defendants.
☐ Corrects errors; no additional charges or defendants.
☐ Involves, for plea purposes, different charges or adds counts.
☐ Embraces same subject matter but adds the additional defendants or charges below:

Defendant name	**Charges**	**Prior Complaint (if applicable)**

Please take notice that the below listed Assistant United States Attorney is the attorney of record for the above captioned case.

September 14, 2010
Date

Karen L. Reynolds
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226-3277
Phone: (313) 226-9672
Fax: (313) 226-2873
E-Mail address: Karen.Reynolds@usdoj.gov

[1] Companion cases are matters in which it appears that (1) substantially similar evidence will be offered at trial, (2) the same or related parties are present, and the cases arise out of the same transaction or occurrence. Cases may be companion cases even though one of them may have already been terminated.

EXHIBIT
3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-1 RANDY SAYLOR
D-2 JENNIFER KOJS,
Defendants.
_____/

Case:2:12-cr-20290
Judge: Tarnow, Arthur J.
MJ: Randon, Mark A.
Filed: 05-07-2012 At 03:36 PM
INFO USA V RANDY SAYLOR, ET AL (EB)
VIOLATION:
18 U.S.C. § 1349 CONSPIRACY

INFORMATION

THE UNITED STATES ATTORNEY CHARGES

COUNT ONE
(18 U.S.C. § 1349 – Conspiracy)

1. Beginning in December 2003, and continuing through February 2008, in the Eastern District of Michigan, Southern Division, defendants **RANDY SAYLOR and JENNIFER KOJS**, together with persons known and unknown to the United States, did knowingly and willfully combine, conspire and agree together to obtain money by means of material false and fraudulent pretenses from lending institutions, financial institutions and individuals. In the process, **RANDY SAYLOR and JENNIFER KOJS** conspired to violate federal laws, including **Title 18, United States Code, Section 1344**, Bank Fraud, by knowingly executing and attempting to execute a scheme or artifice to obtain money, funds, or other property owned by, or in the custody or control of, federally insured financial institutions by means of false and fraudulent pretenses, representations or promises.

OBJECTS OF THE CONSPIRACY

2. **RANDY SAYLOR and JENNIFER KOJS** conspired and agreed with others known

and unknown to the grand jury, to defraud and to obtain money and funds from lending institutions, banks, and individuals by means of material false and fraudulent pretenses, representations, and promises. In this scheme, the conspirators, including **RANDY SAYLOR and JENNIFER KOJS**, obtained fraudulent mortgage loans on numerous properties, including but not limited to those listed in paragraph 7 below, and arranged to have the illegal proceeds and profits of the fraud split, in varying amounts, between them and others.

THE MANNER AND MEANS OF THE CONSPIRACY

3. The manner and means by which the conspirators, including **RANDY SAYLOR and JENNIFER KOJS**, sought to accomplish the purpose of the conspiracy included:

4. For mortgage loans on properties listed in paragraph 7 below, **RANDY SAYLOR and/or JENNIFER KOJS** acted in various capacities, including settlement agent, loan facilitator and recruiter of the individuals who acted as the purported purchaser of the properties, "straw buyers."

5. **RANDY SAYLOR and JENNIFER KOJS** falsified and/or caused to be falsified, material information in the mortgage loan origination process for properties listed in paragraph 7 below, including inflating straw buyer assets and income information, falsifying information regarding down payments, and providing false verification of employment, bank account balances, and other asset information for the straw buyers, and failing to record title work.

6. As **RANDY SAYLOR and JENNIFER KOJS** knew and intended, applications for the mortgage loans on the properties listed in paragraph 7 were submitted to lending institutions and financial institutions which, relying on the false information, approved and disbursed over $20 million dollars in mortgage loans. These loans are now in various stages of default and will result in losses to the lending and financial institutions of more than $20 million dollars.

7. The following properties were used by the conspirators, including **RANDY SAYLOR and JENNIFER KOJS,** to obtain fraudulent mortgage loans.

Date	**Property**	**Financial Institution**	**Loan Amount** (In Dollars)
9/2007	19517 Parke Lane Grosse Ile, Michigan	Washington Mutual Bank	4.5 million
12/2005 7/2006 9/2006	932 Rockway Court Bloomfield Hills, Michigan	Loan City/Indy Mack Bank FSB 1st Ntl. Bank of Arizona Novastar Mortgage, Inc.	880k/220k 748k/132k 880k/220k
10/2005 3/2006 7/2007	1580 W. Long Lake Road Bloomfield Hills, Michigan	Homecomings Resource Mortgage Banking Washington Mutual Bank	1.5 million/260k 1.43million/300k 975k/194,870
12/2005 10/2006	1766 Golf Ridge Drive Bloomfield Hills, Michigan	Bank Of America Washington Mutual Bank	1.5 million 1.5 million

All in violation of Title 18, United States Code, Section 1349.

FORFEITURE ALLEGATIONS
(18 U.S.C. § 981(a)(1)(C) & 28 U.S.C. § 2461(c))

The allegations contained in this Information, above, are incorporated by reference as if set forth fully herein for the purpose of alleging forfeiture pursuant to the provisions of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

Upon conviction of the offense alleged in this Information, defendants **RANDY SAYLOR and JENNIFER KOJS** shall forfeit to the United States any property, real or personal, which constitutes or is derived from proceeds traceable to the violation of 18 U.S.C. § 1349.

Pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants --

a. cannot be located upon the exercise of due diligence;

b. has been transferred to, sold to, or deposited with a third party;

c. has been placed beyond the jurisdiction of this Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) as incorporated by Title 28, United States Code, Section 2461, and/or pursuant to Title 21, United States Code, Section 853(p) in conjunction with Title 18, United States Code, Section 982(b), to seek to forfeit any other property of defendants up to the value of the forfeitable property described above.

Upon conviction of the offense alleged in this Information, defendants **RANDY SAYLOR and JENNIFER KOJS** shall be ordered to pay a sum of money equal to at least $20 million dollars, or an amount as is proved at trial in this matter, representing the total amount of proceeds obtained

as a result of the defendants' violation of 18 U.S.C. § 1349, as alleged in this Information, for which defendants will be jointly and severally liable.

BARBARA L. McQUADE
United States Attorney

s/ ROSS I. MACKENZIE
ROSS I. MACKENZIE
Chief, Complex Crimes Unit
Assistant United States Attorney

s/ GRAHAM L. TEALL
GRAHAM L. TEALL
Assistant United States Attorney

Date: May 7, 2012

United States District Court Eastern District of Michigan	Criminal Case Cover She

Case:2:12-cr-20290
Judge: Tarnow, Arthur J.
MJ: Randon, Mark A.
Filed: 05-07-2012 At 03:36 PM
INFO USA V RANDY SAYLOR, ET AL (EB)

NOTE: It is the responsibility of the Assistant U.S. Attorney signing this form to complete it accurately in all respects.

Reassignment/Recusal Information This matter was opened in the USAO prior to August 15, 2008 **[ ]**

Companion Case Information	**Companion Case Number:**
This may be a companion case based upon **LCrR 57.10 (b)(4)[1]:**	**Judge Assigned:**
☐ **Yes** X☐ **No**	**AUSA's Initials:**

Case Title: USA v. Randy Saylor

County where offense occurred : Wayne

Check One: X☐ **Felony** ☐ **Misdemeanor** ☐ **Petty**

____ Indictment/____Information --- **no** prior complaint.
____Indictment__X_Information --- based upon prior complaint 09-mj-30452
____ Indictment/____Information --- based upon **LCrR 57.10 (d)** ***[Complete Superseding section below]***.

Superseding Case Information

Superseding to Case No: _____ **Judge:** _____

☐ Original case was terminated; no additional charges or defendants.
☐ Corrects errors; no additional charges or defendants.
☐ Involves, for plea purposes, different charges or adds counts.
☐ Embraces same subject matter but adds the additional defendants or charges below:

Defendant name	**Charges**	**Prior Complaint (if applicable)**

Please take notice that the below listed Attorney is the attorney of record for the above captioned case.

May 7, 2012
Date

Graham L. Teall
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
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e-mail: Graham.teall@usdoj.gov

Companion cases are matters in which it appears that (1) substantially similar evidence will be offered at trial, (2) the same or related parties are present, and the cases arise out of the same transaction or occurrence. Cases may be companion cases even though one of them may have already been terminated.

EXHIBIT
4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-2 **JENNIFER KOJS,**

Defendant.
_____/

No. 12-CR-20290

HON. MARIANNE O. BATTANI

Vio: 18 U.S.C. §1349 Conspiracy

RULE 11 PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, defendant JENNIFER KOJS, and the government agree as follows:

1. GUILTY PLEA

A. Count of Conviction

Defendant will enter a plea of guilty to **Count One** of the Information, which charges **Conspiracy to Commit Bank Fraud**, for which the penalty is up to 30 years in prison and up to $1,000,000 in fines.

B. Elements of Offense

The elements of count one:

1) Two or more persons conspired, or agreed, to commit the crime of Bank Fraud, as alleged in the information, to obtain fraudulent mortgages;

2) The defendant knowingly and voluntarily joined the conspiracy.

C. FACTUAL BASIS FOR GUILTY PLEA

The following facts are a sufficient and accurate basis for defendant's guilty plea: Beginning in October 2005, and continuing through February 2008, in the Eastern District of Michigan, JENNIFER KOJS conspired with others, both known and unknown, to obtain fraudulent mortgage loans. In order to further the conspiracy, Kojs acted in various capacities, including loan facilitator. In her capacity as loan facilitator, Kojs falsified and/or caused the falsification of material information in the mortgage loan applications for properties, including inflating straw buyer asset and income information, creating fraudulent and false income documents used to support the loan requests, and providing false verification of employment and bank account balances. As Kojs knew and intended, these applications were submitted to financial institutions which, relying on the false information, approved and disbursed mortgage loans. These mortgage loans are in various stages of default and will result in losses to the financial institutions. Kojs stipulates that the loss resulting from the fraudulently obtained mortgage loans with which she was involved exceeds $200,000.

2. SENTENCING GUIDELINES

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Agreed Guideline Range

There are no sentencing guideline disputes. Except as provided below, defendant's guideline range is **21-27 months**, as set forth on the attached worksheets. If the Court finds:

a) that defendant's criminal history category is higher than reflected on the

attached worksheets, or

b) that the offense level should be higher because, after pleading guilty, defendant made any false statement to or withheld information from her probation officer; otherwise demonstrated a lack of acceptance of responsibility for her offense; or obstructed justice or committed any crime, and if any such finding results in a guideline range higher than 21-27 months, the higher guideline range becomes the agreed range. However, if the Court finds that defendant is a career offender, an armed career criminal, or a repeat and dangerous sex offender as defined under the sentencing guidelines or other federal law, and that finding is not already reflected in the attached worksheets, this paragraph does *not* authorize a corresponding increase in the agreed range.

Neither party may take a position concerning the applicable guidelines that is different than any position of that party as reflected in the attached worksheets, except as necessary to the Court's determination regarding subsections a) and b), above.

3. SENTENCE

The Court will impose a sentence pursuant to 18 U.S.C. §3553, and in doing so must consider the sentencing guideline range.

A. Imprisonment

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) the sentence of imprisonment in this case may not exceed the top of the sentencing guideline range as determined by Paragraph 2B.

B. Supervised Release

A term of supervised release, if imposed, follows the term of imprisonment. There is no agreement on supervised release. In other words, the Court may impose any term of supervised release up to the statutory maximum term, which in this case is **no less than three and no more than 5 years**. The agreement concerning imprisonment described above in Paragraph 3A does not apply to any term of imprisonment that results from any later revocation of supervised release.

C. Special Assessment

Defendant will pay a special assessment of **$100.00** and must provide the government with a receipt for the payment before sentence is imposed.

D. Fine

The Court may impose a fine on each count of conviction in any amount up to **$50,000**.

E. Restitution

The Court shall order restitution to every identifiable victim of defendant's offense. The victims, and the full amounts of restitution in this case, will be determined at or before the time of sentence.

F. Forfeiture

As part of this agreement, pursuant to Title 18, United States Code, Section 981(a)(1)(C) as applied by Title 18, United States Code, Section 2461(c), defendant agrees to forfeit without contest, her right, title, and interest in property, real or personal, which constitutes or is derived from proceeds traceable to the conspiracy to commit

bank fraud, in violation of Title 18, United States Code, Section 1349, as alleged in the Information.

Pursuant to Fed.R.Crim.P.32.2, defendant agrees to the entry of a personal money judgment against her in favor of the United States in the amount of the proceeds obtained, directly or indirectly, from the offense alleged in the Information. Defendant agrees that the forfeiture money judgment may be satisfied, to whatever extent possible, from any property owned or under the control of defendant. To satisfy the money judgment, defendant explicitly agrees to the forfeiture of any assets she has now, or may later acquire, as substitute assets under 21 U.S.C. § 853(p)(2) and waives and relinquishes her rights to oppose the forfeiture of substitute assets under 21 U.S.C. § 853(p)(1) or otherwise.

Defendant agrees to the Court's prompt entry of a Preliminary Order of Forfeiture following defendant's guilty plea, upon application by the United States, incorporating the above referenced money judgment as mandated by Fed. R. Crim. P. 32.2, which shall, in any event, be submitted for entry at or before sentencing. Defendant acknowledges that she understands that the entry of a forfeiture money judgment is part of the sentence that will be imposed in this case, and waives any failure by the Court to advise her of this, pursuant to Fed. R. Crim. P. 11(b)(1)(J) or otherwise, at the change-of-plea hearing.

Defendant further agrees to hold the United States, its agents and employees harmless from any claims whatsoever in connection with the forfeiture of property covered by this Plea Agreement.

Defendant waives the requirements of Federal Rule of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, pronouncement of forfeiture at sentencing, and incorporation of forfeiture in the judgment.

In entering into this agreement, Defendant expressly waives her right to have a jury determine the forfeitability of her interest in the property as provided by Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure.

In entering into this agreement, Defendant knowingly, voluntarily, and intelligently waives any challenge to the forfeiture based upon the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

4. Other Charges:

If the court accepts this agreement, the government will not bring additional charges against defendant based on any of the conduct reflected in the attached worksheets or for other conduct presently known to the government. Following the defendant's guilty plea and sentencing in accordance with this agreement, the government will dismiss all remaining counts in this case.

5. Cooperation

A. Defendant's Obligations. Defendant agrees to assist the U.S. Attorney in the investigation and prosecution of others involved in criminal activities, as specified below.

B. Truthful Information and Testimony. Defendant will provide truthful and complete information concerning her involvement and that of others in the fraud charged in the information as well as other related fraud and non-related matters. Defendant will

provide full debriefings as requested to the U.S. Attorney, and federal, state, and local law enforcement agencies. Defendant will provide truthful testimony at all proceedings, criminal, civil, or administrative, as requested by the U.S. Attorney. Such testimony may include, but is not limited to, grand jury proceedings, trials, and pretrial and post-trial proceedings. Defendant agrees to be available for interviews in preparation of all testimony. Defendant further agrees to submit, upon request, to government-administered polygraph examinations to verify defendant's full and truthful cooperation. Defendant understands that this obligation to provide cooperation continues after sentencing and that failure to follow through constitutes a breach of this agreement.

C. **Nature of Cooperation.** Defendant agrees to cooperate in good faith, meaning that defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to the subjects discussed in the debriefing. In other words, defendant may not omit facts about crimes, participants, or defendant's involvement, and then claim not to have breached this agreement because defendant was not specifically asked questions about those crimes, participants, or involvement. Defendant will notify the U.S. Attorney in advance if defendant intends to offer a statement or debriefing to other persons other than defendant's attorney. Defendant is not prevented in any way from providing truthful information helpful to the defense of any person. Any actions or statements inconsistent with continued cooperation under this agreement, including but not limited to criminal activity, or a statement indicating a refusal to testify, or any other conduct which in any way undermines the effectiveness of defendant's cooperation, constitutes a breach of

this agreement.

6. **U.S. ATTORNEY'S AUTHORITY REGARDING SUBSTANTIAL ASSISTANCE**

A. **Substantial Assistance Determination.** It is exclusively within the U.S. Attorney's discretion to determine whether defendant has provided substantial assistance in the investigation or prosecution of others, and has acted in good faith. Upon the U.S. Attorney's determination that defendant's cooperation amounts to substantial assistance, the U.S. Attorney will either recommend to the court a sentencing range lower than that specified in paragraph 2, or will move for a reduction of sentence pursuant to Fed. R. Crim. P. 35, as appropriate. In either case, the sentence will be determined by the Court.

B. **Use of Information Against Defendant.** In exchange for defendant's agreement to cooperate with the U.S. Attorney, as outlined above, the U.S. Attorney agrees not to use new information that defendant provides (pursuant to this agreement) about defendant's own criminal conduct against defendant at sentencing in this case. Such information may be revealed to the court but may not be used against defendant in determining the sentence. There shall be no such restrictions on the use of information: (1) previously known to law enforcement agencies; (2) revealed to law enforcement agencies by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; or (4) in the event there is a breach of this agreement.

7. **SUBSEQUENT CHALLENGES TO CONVICTION OR BREACH OF AGREEMENT.**

A. If at any time defendant tries to withdraw the guilty plea to any count;

attacks the validity of the conviction on any count; or fails to comply with the terms of the agreement, the U.S. Attorney is released from its promises under this agreement and, in particular, may prosecute defendant on any charge that it agreed to dismiss or not to bring. In addition, if defendant's conviction on any count is vacated, the U.S. Attorney may request resentencing on any remaining count.

B. Defendant waives a double jeopardy defense as to any charges the U.S. Attorney brings or pursues under the previous paragraph. Defendant waives any speedy trial or statute of limitations defense for the period of time between the date defendant signed this agreement and (a) the date an order permitting withdrawal of the plea, vacating the plea, or reversing the conviction on any count becomes final, or (b) the date the U.S. Attorney notifies defendant in writing of defendant's failure to comply with the agreement; whichever is later.

8. **EACH PARTY'S RIGHT TO WITHDRAW FROM THIS AGREEMENT**

The government may withdraw from this agreement if the Court finds the correct guideline range to be different than is determined by Paragraph 2B.

Defendant may withdraw from this agreement, and may withdraw her guilty plea, if the Court decides to impose a sentence higher than the maximum allowed by Part 3. This is the only reason for which defendant may withdraw from this agreement. The Court shall advise defendant that if she does not withdraw her guilty plea under this circumstance, the Court may impose a sentence greater than the maximum allowed by Part 3.

9. WAIVER OF RIGHT TO APPEAL

If the sentence imposed does not exceed the maximum allowed by Part 3 of this agreement, defendant waives any right she has to appeal her conviction or sentence. If the sentence imposed is within the guideline range determined by Paragraph 2B the government agrees not to appeal the sentence, but retains its right to appeal any sentence below that range.

10. CONSEQUENCES OF WITHDRAWAL OF GUILTY PLEA OR VACATION OF CONVICTION

If defendant is allowed to withdraw her guilty plea or if any conviction entered pursuant to this agreement is vacated, the Court shall, on the government's request, reinstate any charges that were dismissed as part of this agreement. If additional charges are filed against defendant within six months after the date the order vacating defendant's conviction or allowing her to withdraw her guilty plea becomes final, which charges relate directly or indirectly to the conduct underlying the guilty plea or to any conduct reflected in the attached worksheets, defendant waives her right to challenge the additional charges on the ground that they were not filed in a timely manner, including any claim that they were filed after the limitations period expired.

11. PARTIES TO PLEA AGREEMENT

Unless otherwise indicated, this agreement does not bind any government agency except the United States Attorney's Office for the Eastern District of Michigan.

12. SCOPE OF PLEA AGREEMENT

This agreement, which includes all documents that it explicitly incorporates, is the complete agreement between the parties. It supersedes all other promises,

representations, understandings, and agreements between the parties concerning the subject matter of this plea agreement that are made at any time before the guilty plea is entered in court. Thus, no oral or written promises made by the government to defendant or to the attorney for defendant at any time before defendant pleads guilty are binding except to the extent they have been explicitly incorporated into this agreement.

This agreement does not prevent any civil or administrative actions against defendant, or any forfeiture claim against any property, by the United States or any other party.

13. ACCEPTANCE OF AGREEMENT BY DEFENDANT

This plea offer expires unless it has been received, fully signed, in the Office of the United States Attorney by 5:00 P.M. on February 3, 2012. The government reserves the right to modify or revoke this offer at any time before defendant pleads guilty.

BARBARA L. MCQUADE
United States Attorney

ROSS I. MACKENZIE
Assistant United States Attorney
Chief, Complex Crimes Unit

GRAHAM TEALL
Assistant United States Attorney

Date: 9/8/12

By signing below, defendant acknowledges that she has read this entire document, understands it, and agrees to its terms. She also acknowledges that she is satisfied with her attorney's advice and representation. Defendant agrees that she has had a full and complete opportunity to confer with her lawyer, and has had all of her questions answered by her lawyer.

THOMAS LOEB
Attorney for Defendant

Date: 1/24/12

JENNIFER KOJS
Defendant

EXHIBIT
5

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-1 Thomas Keller,

Defendant.
_____/

No. 10-20547

HON. STEPHEN J. MURPHY

OFFENSE(S): 18 U.S.C. 1344
Financial Institution Fraud

MAXIMUM PENALTY: 30 years

MAXIMUM FINE: $1,000,000

SUPERVISED RELEASE: >3 YRS < 5 YRS

RULE 11 PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, defendant THOMAS KELLER and the government agree as follows:

1. GUILTY PLEA

A. Count of Conviction

Defendant will enter a plea of guilty to **Count One** of the Information, which charges Financial Institution Fraud.

B. Elements of Offense

The elements of Count One:

1. That the defendant knowingly executed and attempted to execute a

scheme to defraud and,

2. to obtain money by means of material false and fraudulent pretenses and representations,

3. that was in the custody and control of a financial institution as defined by 18 U.S.C.§ 20.

C. Factual Basis for Guilty Plea

The following facts are a sufficient and accurate basis for defendant's guilty plea: "Michigan Land Development, LLC" (MLD) purported to be a real estate investment company doing business in the State of Michigan. Defendant Thomas Keller operated MLD and used it to facilitate the purchase and sale of properties with fraudulently inflated appraised values and false buyer asset and income information.

From in or about December 2005 through January 2006, Defendant Thomas Keller devised a scheme to defraud Bank of America, a financial institution in the Eastern District of Michigan. On January 11, 2006, Keller used MLD to purchase 9430 Highland Court in Davison, Michigan for $548,000. On that same day, using a false and inflated appraisal for the property, Keller sold 9430 Highland Court to a straw buyer for $1,150,000. In addition to the inflated appraisal Keller help arrange for the straw buyer's asset and income information to be grossly inflated on the loan application. The lending institution was Bank of America which relied on the material and false appraisal and asset and income information in approving and disbursing

the loan. The resulting illegally gained proceeds were split between Keller and others involved in the fraud.

Although Keller is pleading guilty to one instance of financial institution fraud, he admits that he was involved in other instances of fraudulent conduct which have been used as relevant conduct in calculating his sentencing guidelines and for which he will be responsible for paying restitution. The parties agree that the fraud loss will be more than $1 million and less than $2.5 million.

2. SENTENCING AGREEMENT

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Imprisonment. Pursuant to Rule 11(c)(1)(B), the parties recommend to the Court that a sentence of imprisonment within the range of **31-41** months, to be followed by a term of supervised release of between **3 and 5 years**, is a reasonable and appropriate disposition of the case. The parties further agree that they will not seek, recommend or advocate for a sentence outside of that range. The parties understand that their recommendation is not binding on the Court, and that if the Court does not follow the recommendation, defendant will have no right to withdraw his guilty plea.

Defendant further understands and agrees that, if his criminal history score under the Sentencing Guidelines is determined to be higher than that reflected in the attached worksheets, the parties will recommend to the Court that a sentence within the range corresponding to the stipulated offense level and that higher criminal history score is a reasonable and appropriate sentence, and neither party will seek, recommend or advocate for a sentence outside that corrected sentence range.

C. Relevant Conduct

The relevant conduct in this case includes the following:

Loss related to the fraudulent sale of 3231 Rivershyre Parkway, Davison, Michigan.

D. Supervised Release

A term of supervised release, if imposed, follows the term of imprisonment. There is no agreement on supervised release. In other words, the Court may impose any term of supervised release up to the statutory maximum term, which in this case is **5 years**. The agreement concerning imprisonment described above in Paragraph 3A does not apply to any term of imprisonment that results from any later revocation of supervised release.

E. Special Assessment

Defendant will pay a special assessment of **$100** and must provide the government with a receipt for the payment before sentence is imposed.

F. Fine

No more than **$75,000.**

G. Restitution

The Court shall order restitution to every identifiable victim of defendant's offense. The victims, and the full amounts of restitution in this case, will be determined before defendant is sentenced.

4. Cooperation Agreement

Pursuant to paragraph 4 of the Rule 11 plea agreement entered into the parties this date, the parties agree as follows:

1. Cooperation. Defendant agrees to assist the United States Attorney's Office in the investigation and prosecution of others involved in criminal activities, as specified below.

a. Truthful Information and Testimony. Defendant will provide truthful and complete information concerning all facts of this case known to him. Defendant will provide full debriefings as requested to the U.S. Attorney, and federal, state, and local law enforcement agencies. Defendant will provide truthful testimony at all proceedings, criminal, civil, or administrative, as

requested by the U.S. Attorney. Such testimony may include, but is not limited to, grand jury proceedings, trials, and pretrial and post-trial proceedings. Defendant agrees to be available for interviews in preparation of all testimony. Defendant further agrees to submit, upon request, to government-administered polygraph examinations to verify defendant's full and truthful cooperation. Defendant understands that this obligation to provide cooperation continues after sentencing and that failure to follow through constitutes a breach of this agreement.

b. Nature of Cooperation. The defendant agrees to cooperate in good faith, meaning that the defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to the subjects discussed in the debriefing. In other words, the defendant may not omit facts about crimes, participants, or defendant's involvement, and then claim not to have breached this agreement because defendant was not specifically asked questions about those crimes, participants, or involvement. Defendant will notify the U.S. Attorney in advance if defendant intends to offer a statement or debriefing to other persons other than defendant's attorney. Defendant is not prevented in any way from providing truthful information helpful to the defense of any person. Any actions or statements inconsistent with continued cooperation under this agreement, including but not limited to criminal activity, or a statement indicating a refusal to testify, or any

other conduct which in any way undermines the effectiveness of defendant's cooperation, constitutes a breach of this agreement.

2. Government's Authority Regarding Substantial Assistance

a. Substantial Assistance Determination. It is exclusively within the government's discretion to determine whether defendant has provided substantial assistance. Upon the government's determination that defendant's cooperation amounts to substantial assistance in the investigation or prosecution of others, the government will either seek a downward departure at sentencing under U.S.S.G. § 5K1.1, or a reduction of sentence pursuant to Fed. R. Crim. P. 35, as appropriate. If the government makes such a motion, the amount of the reduction, if any, will be determined by the Court.

b. The parties agree that, in the event the government makes a substantial assistance motion, defendant will not advocate that the Court impose a sentence which is less than that recommended by the government. The parties further agree that, in the event of a substantial assistance motion, if the defendant advocates a sentence which is less than that recommended by the government, the government may declare a breach of the agreement.

c. Use of Information Against Defendant. In exchange for defendant's agreement to cooperate with the government, as outlined above, the government agrees not to use new information that defendant provides (pursuant

to this agreement) about defendant's own criminal conduct against defendant at sentencing in this case. Such information may be revealed to the court but may not be used against the defendant in determining defendant's sentence range, choosing a sentence within the range, or departing from the range. There shall be no such restrictions on the use of information: (1) previously known to law enforcement agencies; (2) revealed to law enforcement agencies by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; or (4) in the event there is a breach of this agreement.

5. EACH PARTY'S RIGHT TO WITHDRAW FROM THIS AGREEMENT

The government may withdraw from this agreement if the Court finds the correct guideline range to be different than is determined by Paragraph 2B.

Defendant may withdraw from this agreement, and may withdraw his guilty plea, if the Court decides to impose a sentence higher than the maximum allowed by Part 3. This is the only reason for which defendant may withdraw from this agreement. The Court shall advise defendant that if he does not withdraw his guilty plea under this circumstance, the Court may impose a sentence greater than the maximum allowed by Part 3.

6. WAIVER OF APPEAL

Defendant waives any right he may have to appeal his conviction. If the sentence imposed does not exceed the maximum allowed by Part 3 of this

agreement, defendant also waives any right he may have to appeal his conviction and sentence. If the sentence imposed is within the guideline range determined by Paragraph 2B the government agrees not to appeal the sentence, but retains its right to appeal any sentence below that range.

Except as expressly provided in Paragraph 1D, above, if the sentence imposed does not exceed the maximum allowed by Part 3 of this agreement, defendant waives any right he has to appeal his conviction and sentence. If the sentence imposed is within the guideline range determined by Paragraph 2B the government agrees not to appeal the sentence, but retains its right to appeal any sentence below that range.

7. CONSEQUENCES OF WITHDRAWAL OF GUILTY PLEA OR VACATION OF CONVICTION

If defendant is allowed to withdraw his guilty plea(s) or if any conviction entered pursuant to this agreement is vacated, the Court shall, on the government's request, reinstate any charges that were dismissed as part of this agreement. If additional charges are filed against defendant within six months after the date the order vacating defendant's conviction or allowing him to withdraw his guilty plea becomes final, which charges relate directly or indirectly to the conduct underlying the guilty plea or to any conduct reflected in the attached worksheets, defendant waives his right to challenge the additional

charges on the ground that they were not filed in a timely manner, including any claim that they were filed after the limitations period expired.

8. PARTIES TO PLEA AGREEMENT

Unless otherwise indicated, this agreement does not bind any government agency except the United States Attorney's Office for the Eastern District of Michigan.

9. SCOPE OF PLEA AGREEMENT

This agreement, which includes all documents that it explicitly incorporates, is the complete agreement between the parties. This agreement supersedes all other promises, representations, understandings and agreements between the parties concerning the subject matter of this plea agreement that were made at any time before the guilty plea is entered in court. Thus, no oral or written promises made by the government to defendant or to the attorney for the defendant at any time before defendant pleads guilty are binding except to the extent they have been explicitly incorporated into this agreement.

Notwithstanding the previous paragraph, if defendant has entered into a proffer agreement in writing or a cooperation agreement in writing with the government, this plea agreement does not supersede or abrogate the terms of any such prior written agreement.

This agreement also does not prevent any civil or administrative actions

against defendant, or any forfeiture claim against any property, by the United States or any other party.

10. ACCEPTANCE OF AGREEMENT BY DEFENDANT

This plea offer expires unless it has been received, fully signed, in the Office of the United States Attorney by **5:00 P.M. on December 14, 2010**. The government reserves the right to modify or revoke this offer at any time before defendant pleads guilty.

BARBARA L. MCQUADE
United States Attorney

CYNTHIA OBERG
ASSISTANT UNITED STATES ATTORNEY
CHIEF, WHITE COLLAR CRIMES UNIT

KAREN L. REYNOLDS
ASSISTANT UNITED STATES ATTORNEY

DATE:

BY SIGNING BELOW, DEFENDANT ACKNOWLEDGES THAT HE HAS READ (OR BEEN READ) THIS ENTIRE DOCUMENT, UNDERSTANDS IT, AND AGREES TO ITS TERMS. HE ALSO ACKNOWLEDGES THAT HE IS SATISFIED WITH HIS ATTORNEY'S ADVICE AND REPRESENTATION. DEFENDANT AGREES THAT HE HAS HAD A FULL AND COMPLETE

OPPORTUNITY TO CONFER WITH HIS LAWYER, AND HAS HAD ALL OF HIS QUESTIONS ANSWERED BY HIS LAWYER.

SANFORD PLOTKIN
ATTORNEY FOR DEFENDANT

THOMAS KELLER
DEFENDANT

DATE: 12-14-10

EXHIBIT
6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-1 **RANDY SAYLOR,**

Defendant.
_____/

No. 12-CR -20290

HON. MARIANNE O. BATTANI

Vio: 18 U.S.C. §1349 Conspiracy

RULE 11 PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, defendant Randy Saylor, and the government agree as follows:

1. GUILTY PLEA

A. Count of Conviction

Defendant will enter a plea of guilty to **Count One** of the Information which charges **Conspiracy to Commit Bank Fraud** and for which the penalty is up to 30 years in prison and a fine of up to $1,000,000.

B. Elements of Offense

The elements of count one:

1) Two or more persons conspired, or agreed, to commit the crime of Bank Fraud as alleged in the information, to obtain fraudulent mortgages;

2) The defendant knowingly and voluntarily joined the conspiracy.

C. FACTUAL BASIS FOR GUILTY PLEA

The following facts are a sufficient and accurate basis for defendant's guilty plea: Beginning in December 2003, and continuing through February 2008, in the Eastern District of Michigan, Randy Saylor conspired with others, both known and unknown, to obtain fraudulent mortgage loans on properties including but not limited to those specified in paragraph 7 of the information.

In order to further the conspiracy, Saylor committed the following: Saylor recruited individuals to act as "straw purchasers" to apply for and obtain mortgages on properties located in Bloomfield Hills and Grosse Ile, Michigan knowing that the individuals were not qualified to obtain the mortgages. Saylor falsified and/or caused the falsification of material documentation and information in the mortgage loan applications for these individuals, including inflating the straw purchasers' asset and income information, creating fraudulent and false income documents, and providing false verification of employment and bank account balances. Saylor caused this false documentation to be prepared and then caused it to be submitted to the lenders on the straw purchasers' behalf. Further, at closing for some of the loans in question, Saylor failed to pay off or caused the failure to pay off previous loans outstanding on the property. To create the impression that some of the properties at issue in this case were not encumbered by outstanding mortgages, Saylor failed to file or caused the failure to file title documents. As Saylor knew and intended, the mortgage applications were submitted to financial institutions which, relying on the false information, approved and disbursed over $20 million dollars in mortgage loans. These mortgage loans are in

various stages of default and will result in losses to the financial institutions of more than $20 million dollars.

2. SENTENCING GUIDELINES

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Agreed Guideline Range

There are no sentencing guideline disputes. Except as provided below, defendant's guideline range is **87-108 months**, as set forth on the attached worksheets. If the Court finds:

a) that defendant's criminal history category is higher than reflected on the attached worksheets, or

b) that the offense level should be higher because, after pleading guilty, defendant made any false statement to or withheld information from his probation officer; otherwise demonstrated a lack of acceptance of responsibility for his offense; or obstructed justice or committed any crime, and if any such finding results in a guideline range higher than **87-108 months**, the higher guideline range becomes the agreed range. However, if the Court finds that defendant is a career offender, an armed career criminal, or a repeat and dangerous sex offender as defined under the sentencing guidelines or other federal law, and that finding is not already reflected in the attached worksheets, this paragraph does *not* authorize a corresponding increase in the agreed range.

Neither party may take a position concerning the applicable guidelines that is

different than any position of that party as reflected in the attached worksheets, except as necessary to the Court's determination regarding subsections a) and b), above.

3. SENTENCE

The Court will impose a sentence pursuant to 18 U.S.C. §3553, and in doing so must consider the sentencing guideline range.

A. Imprisonment

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) the sentence of imprisonment in this case may not exceed the top of the sentencing guideline range as determined by Paragraph 2B.

B. Supervised Release

A term of supervised release, if imposed, follows the term of imprisonment. There is no agreement on supervised release. In other words, the Court may impose any term of supervised release up to the statutory maximum term, which in this case is **no less than three and no more than 5 years**. The agreement concerning imprisonment described above in Paragraph 3A does not apply to any term of imprisonment that results from any later revocation of supervised release.

C. Special Assessment

Defendant will pay a special assessment of **$100.00** and must provide the government with a receipt for the payment before sentence is imposed.

D. Fine

The Court may impose a fine on each count of conviction in any amount up to **$125,000**.

E. Restitution

The Court shall order restitution to every identifiable victim of defendant's offense. The victims, and the full amounts of restitution in this case, will be determined at or before the time of sentence.

F. Forfeiture

As part of this agreement, pursuant to Title 18, United States Code, Section 981(a)(1)(C) as applied by Title 18, United States Code, Section 2461(c), defendant agrees to forfeit without contest, his right, title, and interest in property, real or personal, which constitutes or is derived from proceeds traceable to the conspiracy to commit bank fraud, in violation of Title 18, United States Code, Section 1349, as alleged in the Information.

Pursuant to Fed.R.Crim.P.32.2, defendant agrees to the entry of a personal money judgment against him in favor of the United States in the amount of the proceeds obtained, directly or indirectly, from the offense alleged in the Information. Defendant agrees that the forfeiture money judgment may be satisfied, to whatever extent possible, from any property owned or under the control of defendant. To satisfy the money judgment, defendant explicitly agrees to the forfeiture of any assets he has now, or may later acquire, as substitute assets under 21 U.S.C. § 853(p)(2) and waives and relinquishes his rights to oppose the forfeiture of substitute assets under 21 U.S.C. § 853(p)(1) or otherwise.

Defendant agrees to the Court's prompt entry of a Preliminary Order of Forfeiture following defendant's guilty plea, upon application by the United States, incorporating

the above referenced money judgment as mandated by Fed. R. Crim. P. 32.2, which shall, in any event, be submitted for entry at or before sentencing. Defendant acknowledges that he understands that the entry of a forfeiture money judgment is part of the sentence that will be imposed in this case, and waives any failure by the Court to advise him of this, pursuant to Fed. R. Crim. P. 11(b)(1)(J) or otherwise, at the change-of-plea hearing.

Defendant further agrees to hold the United States, its agents and employees harmless from any claims whatsoever in connection with the forfeiture of property covered by this Plea Agreement.

Defendant waives the requirements of Federal Rule of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, pronouncement of forfeiture at sentencing, and incorporation of forfeiture in the judgment.

In entering into this agreement, Defendant expressly waives his right to have a jury determine the forfeitability of his interest in the property as provided by Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure.

In entering into this agreement, Defendant knowingly, voluntarily, and intelligently waives any challenge to the forfeiture based upon the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

4. **Other Charges:**

If the court accepts this agreement, the government will not bring additional charges against defendant based on any of the conduct reflected in the attached worksheets or for other conduct presently known to the government. Following the

defendant's guilty plea and sentencing in accordance with this agreement, the government will dismiss all remaining counts in this case.

5. Cooperation

A. Defendant's Obligations. Defendant agrees to assist the U.S. Attorney in the investigation and prosecution of others involved in criminal activities, as specified below.

B. Truthful Information and Testimony. Defendant will provide truthful and complete information concerning his involvement and that of others in the fraud charged in the information as well as other related fraud and non-related matters. Defendant will provide full debriefings as requested to the U.S. Attorney, and federal, state, and local law enforcement agencies. Defendant will provide truthful testimony at all proceedings, criminal, civil, or administrative, as requested by the U.S. Attorney. Such testimony may include, but is not limited to, grand jury proceedings, trials, and pretrial and post-trial proceedings. Defendant agrees to be available for interviews in preparation of all testimony. Defendant further agrees to submit, upon request, to government-administered polygraph examinations to verify defendant's full and truthful cooperation. Defendant understands that this obligation to provide cooperation continues after sentencing and that failure to follow through constitutes a breach of this agreement.

C. Nature of Cooperation. Defendant agrees to cooperate in good faith, meaning that defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to the subjects discussed in the debriefing. In other words, defendant may not omit facts about crimes,

participants, or defendant's involvement, and then claim not to have breached this agreement because defendant was not specifically asked questions about those crimes, participants, or involvement. Defendant will notify the U.S. Attorney in advance if defendant intends to offer a statement or debriefing to other persons other than defendant's attorney. Defendant is not prevented in any way from providing truthful information helpful to the defense of any person. Any actions or statements inconsistent with continued cooperation under this agreement, including but not limited to criminal activity, or a statement indicating a refusal to testify, or any other conduct which in any way undermines the effectiveness of defendant's cooperation, constitutes a breach of this agreement.

6. **U.S. ATTORNEY'S AUTHORITY REGARDING SUBSTANTIAL ASSISTANCE**

A. **Substantial Assistance Determination.** It is exclusively within the U.S. Attorney's discretion to determine whether defendant has provided substantial assistance in the investigation or prosecution of others, and has acted in good faith. Upon the U.S. Attorney's determination that defendant's cooperation amounts to substantial assistance, the U.S. Attorney will either recommend to the court a sentencing range lower than that specified in paragraph 2, or will move for a reduction of sentence pursuant to Fed. R. Crim. P. 35, as appropriate. In either case, the sentence will be determined by the Court.

B. **Use of Information Against Defendant.** In exchange for defendant's agreement to cooperate with the U.S. Attorney, as outlined above, the U.S. Attorney agrees not to use new information that defendant provides (pursuant to this agreement)

about defendant's own criminal conduct against defendant at sentencing in this case. Such information may be revealed to the court but may not be used against defendant in determining the sentence. There shall be no such restrictions on the use of information: (1) previously known to law enforcement agencies; (2) revealed to law enforcement agencies by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; or (4) in the event there is a breach of this agreement.

7. SUBSEQUENT CHALLENGES TO CONVICTION OR BREACH OF AGREEMENT.

A. If at any time defendant tries to withdraw the guilty plea to any count; attacks the validity of the conviction on any count; or fails to comply with the terms of the agreement, the U.S. Attorney is released from its promises under this agreement and, in particular, may prosecute defendant on any charge that it agreed to dismiss or not to bring. In addition, if defendant's conviction on any count is vacated, the U.S. Attorney may request resentencing on any remaining count.

B. Defendant waives a double jeopardy defense as to any charges the U.S. Attorney brings or pursues under the previous paragraph. Defendant waives any speedy trial or statute of limitations defense for the period of time between the date defendant signed this agreement and (a) the date an order permitting withdrawal of the plea, vacating the plea, or reversing the conviction on any count becomes final, or (b) the date the U.S. Attorney notifies defendant in writing of defendant's failure to comply with the agreement; whichever is later.

8. EACH PARTY'S RIGHT TO WITHDRAW FROM THIS AGREEMENT

The government may withdraw from this agreement if the Court finds the correct guideline range to be different than is determined by Paragraph 2B.

Defendant may withdraw from this agreement, and may withdraw his guilty plea, if the Court decides to impose a sentence higher than the maximum allowed by Part 3. This is the only reason for which defendant may withdraw from this agreement. The Court shall advise defendant that if he does not withdraw his guilty plea under this circumstance, the Court may impose a sentence greater than the maximum allowed by Part 3.

9. WAIVER OF RIGHT TO APPEAL

If the sentence imposed does not exceed the maximum allowed by Part 3 of this agreement, defendant waives any right he has to appeal his conviction or sentence. If the sentence imposed is within the guideline range determined by Paragraph 2B the government agrees not to appeal the sentence, but retains its right to appeal any sentence below that range.

10. CONSEQUENCES OF WITHDRAWAL OF GUILTY PLEA OR VACATION OF CONVICTION

If defendant is allowed to withdraw his guilty plea or if any conviction entered pursuant to this agreement is vacated, the Court shall, on the government's request, reinstate any charges that were dismissed as part of this agreement. If additional charges are filed against defendant within six months after the date the order vacating defendant's conviction or allowing him to withdraw his guilty plea becomes final, which charges relate directly or indirectly to the conduct underlying the guilty plea or to any

conduct reflected in the attached worksheets, defendant waives his right to challenge the additional charges on the ground that they were not filed in a timely manner, including any claim that they were filed after the limitations period expired.

11. PARTIES TO PLEA AGREEMENT

Unless otherwise indicated, this agreement does not bind any government agency except the United States Attorney's Office for the Eastern District of Michigan.

12. SCOPE OF PLEA AGREEMENT

This agreement, which includes all documents that it explicitly incorporates, is the complete agreement between the parties. It supersedes all other promises, representations, understandings, and agreements between the parties concerning the subject matter of this plea agreement that are made at any time before the guilty plea is entered in court. Thus, no oral or written promises made by the government to defendant or to the attorney for defendant at any time before defendant pleads guilty are binding except to the extent they have been explicitly incorporated into this agreement.

This agreement does not prevent any civil or administrative actions against defendant, or any forfeiture claim against any property, by the United States or any other party.

13. ACCEPTANCE OF AGREEMENT BY DEFENDANT

This plea offer expires unless it has been received, fully signed, in the Office of the United States Attorney by 5:00 P.M. on February 3, 2012. The government

reserves the right to modify or revoke this offer at any time before defendant pleads guilty.

BARBARA L. MCQUADE
United States Attorney

ROSS I. MACKENZIE
Assistant United States Attorney
Chief, Complex Crimes Unit

GRAHAM TEALL
Assistant United States Attorney

Date:

By signing below, defendant acknowledges that he has read this entire document, understands it, and agrees to its terms. He also acknowledges that he is satisfied with his attorney's advice and representation. Defendant agrees that he has had a full and complete opportunity to confer with his lawyer, and has had all of his questions answered by his lawyer.

DAVID THOLEN
Attorney for Defendant

RANDY SAYLOR
Defendant

Date:

United States District Court
Eastern District of Michigan

United States of America
V.
RANDY SAYLOR

JUDGMENT IN A CRIMINAL CASE

Case Number: 12CR20290-1
USM Number: 43994-039

DAVID C. THOLEN
Defendant's Attorney

THE DEFENDANT:

■ Pleaded guilty to count(s) **ONE**.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:USC:1349 AND 18:USC:1344(2)	CONSPIRACY TO COMMIT BANK FRAUD	02/2008	ONE

The defendant is sentenced as provided in pages **2 through 6** of this judgment. This sentence is imposed pursuant to the Sentencing Reform Act of 1984

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

05/07/2013
Date of Imposition of Judgment

s/Marianne O Battani
United States District Judge

05/16/2013
Date Signed

DEFENDANT: RANDY SAYLOR
CASE NUMBER: 12CR20290-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **72 MONTHS**

The court makes the following recommendations to the Bureau of Prisons: **INMATE FINANCIAL RESPONSIBILITY PROGRAM.**

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prison: **as notified by the United States Marshal.**

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

DEFENDANT: RANDY SAYLOR
CASE NUMBER: 12CR20290-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 YEARS.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

If the defendant is convicted of a felony offense, DNA collection is required by Public Law 108-405.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. Revocation of supervised release is mandatory for possession of a controlled substance.

■ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report ot the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

14) the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. Revocation of supervised release is mandatory for possession of a firearm.

DEFENDANT: RANDY SAYLOR
CASE NUMBER: 12CR20290-1

SPECIAL CONDITIONS OF SUPERVISION

■ The defendant shall make monthly payments on any remaining balance of the:**restitution**, **special assessment** at a rate and schedule recommended by the Probation Department and approved by the Court.

■ The defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer.

■ The defendant shall provide the probation officer access to any requested financial information.

■ The defendant shall participate in a program approved by the Probation Department for mental health counseling. ■ If necessary.

DEFENDANT: RANDY SAYLOR
CASE NUMBER: 12CR20290-1

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS:	$ 100.00	$ 0.00	$ 13,504,914.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
FIRST AMERICAN TITLE INSURANCE COMPANY ATTN: Beth Schreiber 27775 Diehl Rd., Ste. 200 Warrenville, IL 0555	$0.00	$13,504,914.00	
TOTALS:	$ 0.00	$ 13,504,914.00	

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the restitution

***** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RANDY SAYLOR
CASE NUMBER: 12CR20290-1

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

PURSUANT TO 18 U.S.C. 981(a)(1)(C) TOGETHER WITH 28 U.S.C. 2461, AND FED.R.CRIM.P.32.2, DEFENDANT SHALL FORFEIT THIRTEEN MILLION, FIVE HUNDRED FOUR THOUSAND, NINE HUNDRED AND FOURTEEN DOLLARS ($13,504,914.00) TO THE UNITED STATES AS SUCH PROPERTY CONSTITUTES PROCEEDS FROM DEFENDANT'S VIOLATION.

EXHIBIT
7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-1 STACY MORGAN (Cts. 1-9)
D-2 JAMES BOUDREAU (Cts. 1-5)
D-3 BLYTHE CONTE (AMENSON) (Ct. 1)

Defendants.
_____/

CRIMINAL NO. 11-cr-20435

HON. GERALD E. ROSEN

VIOLATIONS:

Ct. 1:	**18 U.S.C. § 1349, CONSPIRACY;**
Cts. 2-5:	**18 U.S.C. §§ 1343, 2 WIRE FRAUD, AIDING AND ABETTING;**
Ct. 6:	**18 U.S.C. § 1956(h), CONSPIRACY;**
Cts. 7-9:	**18 U.S.C. §§ 1957, 2 MONEY LAUNDERING, AIDING AND ABETTING.**

18 U.S.C. § 981(a)(1)(C); 28 U.S.C. §2461;
18 U.S.C. § 982(a)(1)
CRIMINAL FORFEITURE

SECOND SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES

COUNT ONE
(18 U.S.C. § 1349 – Conspiracy)

D-1 STACY MORGAN
D-2 JAMES BOUDREAU
D-3 BLYTHE CONTE (AMENSON)

1. Beginning in or about April 2005 and continuing through in or about July 2007, in the Eastern District of Michigan, Southern Division, defendants **STACY MORGAN, JAMES**

BOUDREAU and **BLYTHE CONTE (AMENSON)** together with persons known and unknown to the United States, did knowingly and willfully combine, conspire and agree together to obtain money by means of material false and fraudulent pretenses from a lending institution, and individuals. In the process, **STACY MORGAN, JAMES BOUDREAU and BLYTHE CONTE (AMENSON)** conspired to violate federal laws, including: **Title 18, United States Code, Section 1343**, that is, Wire Fraud, by knowingly executing and attempting to execute a scheme and artifice to defraud and to obtain money and funds by means of material false and fraudulent pretenses, representations and promises, and in doing so transmitting and causing the transmission of a wire communication in interstate commerce, which affected financial institutions.

OBJECTS OF THE CONSPIRACY

2. **STACY MORGAN, JAMES BOUDREAU and BLYTHE CONTE (AMENSON)** conspired and agreed with others known and unknown to the grand jury, to defraud and to obtain money and funds from a lending institution and individuals by means of material false and fraudulent pretenses, representations, and promises. In this scheme, the conspirators, including **STACY MORGAN, JAMES BOUDREAU and BLYTHE CONTE (AMENSON)** obtained fraudulent mortgage loans for the properties listed in paragraph 10 below, and arranged to have the illegal proceeds and profits of the fraud split, in varying amounts, among themselves and others.

THE MANNER AND MEANS OF THE CONSPIRACY

3. The manner and means by which the conspirators, including **STACY MORGAN, JAMES BOUDREAU and BLYTHE CONTE (AMENSON) ,** sought to accomplish the

purpose of the conspiracy included:

4. For loans they obtained for the properties listed in paragraph 10 below, **STACY MORGAN** acted in various capacities, including loan facilitator and recruiter of the individuals who acted as the purported loan applicants. **JAMES BOUDREAU** acted as a real estate agent, locating the properties for the fraudulent transactions, and also acted as an appraiser, helping to establish inflated values for the properties sold. **BLYTHE CONTE (AMENSON)** recruited individuals that she knew to be unqualified to obtain the loans in question, referred these individuals to **STACY MORGAN** for the purpose of obtaining the loans and further facilitated the loan process.

5. **STACY MORGAN** falsified, and/or caused to be falsified, material information in the loan applications and closing documents for loans obtained on the properties listed in paragraph 10 below, including inflating the loan applicants' assets and income information, creating fraudulent and false income documents used to support the loan requests, providing false verification of employment and bank account balances for the applicants, making false representations regarding the use of the down payments, and falsely representing the use to which the loan proceeds would be made.

6. **JAMES BOUDREAU** acted as the real estate broker in the transactions despite being the appraiser of the properties' purported market value and certifying that he had no financial interest in the outcome of the transaction.

7. As **STACY MORGAN, JAMES BOUDREAU** and **BLYTHE CONTE (AMENSON)** knew and intended, applications for mortgage loans obtained on the properties listed in paragraph 10 were submitted to a lending institution which, relying on the false

information, approved and disbursed over $10.68 million in loans. The scheme continued at closing when the misrepresentations were repeated and the transactions were executed. These loans have defaulted resulting in losses to the lending and financial institutions.

All in violation of Title 18, United States Code, Section 1349.

COUNTS TWO through FIVE
(18 U.S.C. §§1343 &2 -- Wire Fraud, Aiding and Abetting)

D-1 STACY MORGAN
D-2 JAMES BOUDREAU

8. The allegations in paragraph one through six are repeated and incorporated here in full.

9. From May 2005 through July 2007, in the Eastern District of Michigan, Southern Division, defendants **STACY MORGAN, JAMES BOUDREAU,** and others, having devised a scheme and artifice to defraud and for obtaining money by means of material false and fraudulent pretenses, representations or promises, transmitted and caused to be transmitted by means of wire communication in interstate or foreign commerce, writings, signs, signals, pictures or sounds, in the form of a wire transfer of funds in the amounts contained in paragraph 10 below. The wire transfers were from Countrywide Home Loans, Inc.'s (the lending entity) bank account at Treasury Bank in Calabasas, California. The wire transfers were sent to the Fidelity Bank of Birmingham, Michigan bank account of the title company, Clear Title, Inc., in the Eastern District of Michigan, Southern Division, for the purpose of executing the scheme.

10. The wire transfers described above are as follows:

Count	Property Address	Date and Amount of Wire Transfer
2	2937 Turtle Pond Bloomfield Hills, MI	5/20/05 - $2.539m 5/23/05 - $0.555m
3	311 Barden Street Bloomfield Hills, MI	5/26/05 - $2.611m 5/24/05 - $0.333m
4	1890 Heron Ridge Bloomfield Hills, MI	6/2/05 - $2.639m
5	5544 St. Elizabeth Ct. Bloomfield Hills, MI	6/1/05 - $0.477m

COUNT SIX

(18 U.S.C. § 1956(h) Conspiracy to Launder Monetary Instruments)

D-1 STACY MORGAN

11. From on or about May of 2005, through October 2006, in the Eastern District of Michigan and elsewhere, the defendant, **STACY MORGAN,** did knowingly combine, conspire, and agree with other persons known and unknown to the Grand Jury to commit offenses against the United States in violation of Title 18, United States Code Section 1957, to wit: to knowingly engage and attempt to engage, in monetary transactions by, through or to a financial institution, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000, as specified in paragraph 12 below, such property having been derived from a specified unlawful activity, that is, Wire Fraud, in violation of Title 18, United States Code, Section 1343, in violation of Title 18, United States Code, Section 1957.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS SEVEN through NINE
(18 U.S.C. §1957, 2 -- Money Laundering, Aiding and Abetting)

D-1 STACY MORGAN

12. On or about the dates set forth below, in the Eastern District of Michigan, and elsewhere, the defendant, **STACY MORGAN** did knowingly engage and attempt to engage in the following monetary transactions by, through, or to a financial institution, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000, that is, the transfer of U.S. currency, funds, and monetary instruments, such property having been derived from a specified unlawful activity, that is, Wire Fraud, in violation of 18 U.S.C. § 1343:

Count	Date	Amount	Monetary Transaction
7	5 /23/05	$2,156,571.73	Wire transfer from Clear Title (the title company involved in the transactions) to Comerica Bank Acct # 1851120541
8	5/31/05	$2,426,567.40	Wire Transfer from Clear Title to Comerica Bank Acct # 1851120541
9	5/26/05	$2,269,302.25	Wire Transfer from Clear Title's Acct. at Fidelity Bank, Birmingham, MI, Deposited to Daniel Honigman Trust Acct. at UBS Bank, Account Number TZ 6018434.

All in violation of Title 18, United States Code, Sections 1957 and 2.

FORFEITURE ALLEGATIONS

(18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461;
18 U.S.C. § 982(a)(1) - Criminal Forfeiture)

13. The allegations contained in this Indictment, above, are incorporated by reference as if set forth fully herein for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 981 together with Title 28, United States Code, Section 2461,

and Title 18, United States Code, Section 982.

14. Upon conviction of one or more of the violations of Title 18, United States Code, Sections 1349, 1343 and 2 alleged in this Indictment, defendant **STACY MORGAN** shall forfeit to the United States any property, real or personal, which constitutes or is derived from proceeds traceable to such violation(s), pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

15. Upon conviction of one or more of the money laundering violations of Title 18, United States Code, Sections 1956, 1957 and 2 alleged in this Indictment, defendant **STACY MORGAN** shall forfeit to the United States any property, real or personal, involved in, or any property traceable to such violation(s), pursuant to Title 18, United States Code, Section 982(a)(1).

16. Property subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C) together with Title 28, United States Code, Section 2461(c), and/or Title 18, United States Code, Section 982(a)(1) includes, but is not limited to, the following:

- One 2005 Mercedes Benz, VIN No. WDBSK75F15F106646.

17. Money Judgment. Upon conviction of one or more of the violations alleged in this Indictment, defendant **STACY MORGAN** shall be ordered to pay a sum of money in an amount as is proved at trial in this matter, representing the total amount of proceeds obtained as a result of the defendant's violations of Title 18, United States Code, Sections 1349, 1343 and 2, as alleged in this Indictment, and a sum of money in an amount as is proved at trial in this matter, representing the amount involved in defendant's violations of Title 18, United States Code, Sections 1956, 1957 and 2, as alleged in this Indictment.

18. Substitute Assets. If the property described above as being subject to forfeiture, as a

result of any act or omission of the defendant:

(a) Cannot be located upon the exercise of due diligence;

(b) Has been transferred or sold to, or deposited with, a third party;

(c) Has been placed beyond the jurisdiction of the Court;

(d) Has been substantially diminished in value; or

(e) Has been commingled with other property that cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) as incorporated by Title 28, United States Code, Section 2461, and/or pursuant to Title 21, United States Code, Section 853(p) in conjunction with Title 18, United States Code, Section 982(b), to seek to forfeit any other property of defendant up to the value of the forfeitable property described above.

THIS IS A TRUE BILL.

s/ GRAND JURY FOREPERSON
GRAND JURY FOREPERSON

BARBARA L. McQUADE
United States Attorney

s/ ROSS I. MACKENZIE
ROSS I. MACKENZIE
Assistant United States Attorney
Chief, Complex Crimes Unit

s/ GRAHAM L. TEALL
GRAHAM L. TEALL
Assistant United States Attorney

Dated: September 6, 2012

United States District Court Eastern District of Michigan	**Criminal Case Cover Sheet**	**Case Number** 11-CR-20435

NOTE: It is the responsibility of the Assistant U.S. Attorney signing this form to complete it accurately in all respects.

Reassignment/Recusal Information This matter was opened in the USAO prior to August 15, 2008 **[ ]**

Companion Case Information	**Companion Case Number:**
This may be a companion case based upon **LCrR 57.10 (b)(4)**[1]**:**	**Judge Assigned:**
☐ **Yes** X **No**	**AUSA's Initials:**

Case Title: USA v. Stacy Morgan

County where offense occurred : Oakland

Check One: **X☐ Felony** **☐ Misdemeanor** **☐ Petty**

_____Indictment/____Information --- **no** prior complaint.
_____Indictment/____Information --- based upon prior complaint [**Case number:**]
__X__Indictment/____Information --- based upon **LCrR 57.10 (d)** ***[Complete Superseding section below]***.

Superseding Case Information

Superseding to Case No: 11-CR-20435 **Judge:** Gerald E. Rosen

☐ Original case was terminated; no additional charges or defendants.
☐ Corrects errors; no additional charges or defendants.
☐ Involves, for plea purposes, different charges or adds counts.
X Embraces same subject matter but adds the additional defendants or charges below:

Defendant name	**Charges**	**Prior Complaint (if applicable)**
Blythe Conte (Amenson)	18 U.S.C. §1349	

Please take notice that the below listed Assistant United States Attorney is the attorney of record for the above captioned case.

September 6, 2012
Date

Graham L. Teall
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226-3277
Phone:(313) 226-9118
Fax:(313) 226-2873
E-Mail: graham.teall@usdoj.gov

[1] Companion cases are matters in which it appears that (1) substantially similar evidence will be offered at trial, (2) the same or related parties are present, and the cases arise out of the same transaction or occurrence. Cases may be companion cases even though one of them may have already been terminated.

EXHIBIT
8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-3 BLYTHE CONTI,

Defendant.
_____/

No. 11cr-20435

HON. GERALD E. ROSEN

OFFENSE: 18 USC § 4 - Misprision

MAXIMUM PENALTY: 3Years

MAXIMUM FINE: $250,000

RULE 11 PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, defendant BLYTHE CONTI and the government agree as follows:

1. GUILTY PLEA

A. Count(s) of Conviction

Defendant will enter a plea of guilty to **Count One** of the Third Superseding Information which charges Misprision of a Felony, in violation of 18 U.S.C. §4.

B. Elements of Offense(s)

The elements of Count One are as follows:

1. That a felony cognizable by a Court of the United States was committed;

2. That the defendant had knowledge of the actual commission of the felony;

3. That defendant took steps to conceal the offense and did not as soon as possible make the offense known to a Judge or other person in civilian or military authority under the United States.

C. Factual Basis for Guilty Plea

The following facts are a sufficient and accurate basis for defendant's guilty plea:

> Defendant was aware that certain individuals were using "straw purchasers" to obtain mortgage loans during a period from April 2005 to July 2007, in the Eastern District of Michigan. Defendant was also aware that the applications for the mortgage loans in question were based on fraudulent information and false statements. Defendant, knowing of the false statements, took steps to help the properties be sold, thus concealing the information and did not as soon as possible make the offense known to a Judge or other person in civilian or military authority under the United States.

2. SENTENCING GUIDELINES

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Agreed Guideline Range

There are no sentencing guideline disputes. Except as provided below, defendant's guideline range is **12-18 months**, as set forth on the attached worksheets. If the Court finds:

a) that defendant's criminal history category is higher than reflected on the attached worksheets, or

b) that the offense level should be higher because, after pleading guilty, defendant made any false statement to or withheld information from his probation officer; otherwise demonstrated a lack of acceptance of responsibility for his offense; or obstructed justice or committed any crime,

and if any such finding results in a guideline range higher than **12-18 months**, the higher guideline range becomes the agreed range. However, if the Court finds that defendant is a career offender, an armed career criminal, or a repeat and dangerous sex offender as defined under the sentencing guidelines or other federal law, and that finding is not already reflected in the attached worksheets, this paragraph does *not* authorize a corresponding increase in the agreed range.

Neither party may take a position concerning the applicable guidelines that is different than any position of that party as reflected in the attached worksheets,

except as necessary to the Court's determination regarding subsections a) and b), above.

3. SENTENCE

The Court will impose a sentence pursuant to 18 U.S.C. §3553, and in doing so must consider the sentencing guideline range.

A. Imprisonment

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) the sentence of imprisonment in this case may not exceed the top of the sentencing guideline range as determined by Paragraph 2B.

B. Supervised Release

A term of supervised release, if imposed, follows the term of imprisonment. There is no agreement on supervised release. In other words, the Court may impose any term of supervised release up to the statutory maximum term, which in this case is **1 year**. The agreement concerning imprisonment described above in Paragraph 3A does not apply to any term of imprisonment that results from any later revocation of supervised release.

C. Special Assessment

Defendant will pay a special assessment of **$100** and must provide the government with a receipt for the payment before sentence is imposed.

D. Fine

There is no agreement as to a fine.

E. Restitution

The Court shall order restitution to every identifiable victim of defendant's offense(s) and all other relevant conduct.

4. OTHER CHARGES

If the Court accepts this agreement, the government will dismiss all remaining charges in this case.

5. EACH PARTY'S RIGHT TO WITHDRAW FROM THIS AGREEMENT

The government may withdraw from this agreement if the Court finds the correct guideline range to be different than is determined by Paragraph 2B.

Defendant may withdraw from this agreement, and may withdraw his guilty plea, if the Court decides to impose a sentence higher than the maximum allowed by Part 3. This is the only reason for which defendant may withdraw from this agreement. The Court shall advise defendant that if she does not withdraw her

guilty plea under this circumstance, the Court may impose a sentence greater than the maximum allowed by Part 3.

6. WAIVER OF APPEAL

Defendant waives any right she may have to appeal her conviction. If the sentence imposed does not exceed the maximum allowed by Part 3 of this agreement, defendant also waives any right she may have to appeal her sentence. If the sentence imposed is within the guideline range determined by Paragraph 2B the government agrees not to appeal the sentence, but retains its right to appeal any sentence below that range.

7. CONSEQUENCES OF WITHDRAWAL OF GUILTY PLEA(S) OR VACATION OF CONVICTION(S)

If defendant is allowed to withdraw her guilty plea(s) or if any conviction entered pursuant to this agreement is vacated, the Court shall, on the government's request, reinstate any charges that were dismissed as part of this agreement. If additional charges are filed against defendant within six months after the date the order vacating defendant's conviction or allowing her to withdraw her guilty plea(s)

becomes final, which charges relate directly or indirectly to the conduct underlying the guilty plea(s) or to any conduct reflected in the attached worksheets, defendant waives hier right to challenge the additional charges on the ground that they were not filed in a timely manner, including any claim that they were filed after the limitations period expired.

8. PARTIES TO PLEA AGREEMENT

Unless otherwise indicated, this agreement does not bind any government agency except the United States Attorney's Office for the Eastern District of Michigan.

9. SCOPE OF PLEA AGREEMENT

This agreement, which includes all documents that it explicitly incorporates, is the complete agreement between the parties. This agreement supersedes all other promises, representations, understandings and agreements between the parties concerning the subject matter of this plea agreement that were made at any time before the guilty plea is entered in court. Thus, no oral or written promises made by the government to defendant or to the attorney for the defendant at any time before

defendant pleads guilty are binding except to the extent they have been explicitly incorporated into this agreement. Notwithstanding the previous paragraph, if defendant has entered into a proffer agreement in writing or a cooperation agreement in writing with the government, this plea agreement does not supersede or abrogate the terms of any such prior written agreement.

This agreement also does not prevent any civil or administrative actions against defendant, or any forfeiture claim against any property, by the United States or any other party.

10. ACCEPTANCE OF AGREEMENT BY DEFENDANT

This plea offer expires unless it has been received, fully signed, in the Office of the United States Attorney by **5:00 P.M. on April 11, 2014**. The Government reserves the right to modify or revoke this offer at any time before defendant pleads guilty.

BARBARA L. MCQUADE
United States Attorney

CYNTHIA OBERG
ASSISTANT UNITED STATES ATTORNEY
CHIEF, COMPLEX CRIMES UNIT

GRAHAM TEALL
ASSISTANT UNITED STATES ATTORNEY

DATE: 4/11, 2014

BY SIGNING BELOW, DEFENDANT ACKNOWLEDGES THAT SHE HAS READ (OR BEEN READ) THIS ENTIRE DOCUMENT, UNDERSTANDS IT, AND AGREES TO ITS TERMS. SHE ALSO ACKNOWLEDGES THAT SHE IS SATISFIED WITH HER ATTORNEY'S ADVICE AND REPRESENTATION. DEFENDANT AGREES THAT SHE HAS HAD A FULL AND COMPLETE OPPORTUNITY TO CONFER WITH HIS LAWYER, AND HAS HAD ALL OF HER QUESTIONS ANSWERED BY HER LAWYER.

R0BERT MORGAN
ATTORNEY FOR DEFENDANT

BLYTHE CONTI
DEFENDANT

DATE: 4/17/14

EXHIBIT
9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-1 **STACY MORGAN,**

Defendant.
_____/

CRIMINAL NO. 11-cr-20435

HON. GERALD E. ROSEN

Vio: 18 U.S.C. §1349 Conspiracy

RULE 11 PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, defendant Stacy Morgan, and the government agree as follows:

1. GUILTY PLEA

A. Count of Conviction

Defendant will enter a plea of guilty to **Count One** of the Second Superseding Indictment, which charges **Conspiracy to Commit Fraud** and for which the penalty is up to 30 years in prison and a fine of up to $1,000,000.

B. Elements of Offense

The elements of count one:

1) Two or more persons conspired, or agreed, to commit the crime of Wire Fraud as alleged in the Second Superseding Indictment, to obtain fraudulent

mortgages;

2) The defendant knowingly and voluntarily joined the conspiracy.

C. FACTUAL BASIS FOR GUILTY PLEA

The following facts are a sufficient and accurate basis for defendant's guilty plea: Beginning in December 2003, and continuing through February 2008, in the Eastern District of Michigan, Stacy Morgan conspired with others, both known and unknown, to obtain fraudulent mortgage loans on properties including but not limited to those specified below:

1. 2937 Turtle Pond, Bloomfield Hills, MI
2. 311 Barden Street, Bloomfield Hills, MI
3. 1890 Heron Ridge, Bloomfield Hills, MI
4. 5544 St. Elizabeth Ct., Bloomfield Hills, MI

In order to further the conspiracy, Morgan made and/or caused to be made materially false and fraudulent statements to be included in mortgage loan applications, intending that these statement be relied on by the lenders in reaching a decision to grant the loans. These materially false and fraudulent statements included inflated straw buyer asset and income information, supported by false income documents, false verification of employment statements and false bank account records.

Further, Morgan and others used or caused a trick transaction to be used called a "double closing" to facilitate some of these fraudulent loans. These "double closings" allowed Morgan to create the false impression that he, or an entity associated with him, owned the properties at the time they were sold to the straw buyers. This was accomplished by using the proceeds from a mortgage loan obtained by the straw buyer on a property Morgan falsely purported to own to fund the purchase of that same property by Morgan. When these two transactions occurred at the same time in a "double closing," the material fact that Morgan did not actually own the property when it was sold to the straw buyer was hidden from the lender. Double closings were expressly forbidden by the lenders in their closing instructions. These lenders relied on the materially false and fraudulent statements Morgan made and/or caused to be made in approving and disbursing mortgage loans, which involved the interstate transmission of funds using wire communication facilities. The parties agree that these mortgage loans are in various stages of default and will result in losses to the lenders.

2. SENTENCING GUIDELINES

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Agreed Guideline Range

There are no sentencing guideline disputes. Except as provided below, defendant's guideline range is **63-78 months**, as set forth on the attached worksheets. However, the parties agree that defendant may argue at sentencing that the two level adjustment for his role in the offense does not apply. If the Court should find that to be the case the resulting guideline range agreed to by the parties would be **51-63 months**. Further the parties agree that the defendant may argue at sentencing that the amount of loss is less than $7million.

If the Court finds:

a) that defendant's criminal history category is higher than reflected on the attached worksheets, or

b) that the offense level should be higher because, after pleading guilty, defendant made any false statement to or withheld informatiom from his probation officer; otherwise demonstrated a lack of acceptance of responsibility for his offense; or obstructed justice or committed any crime, and if any such finding results in a guideline range higher than **63-78 months**, the higher guideline range becomes the

agreed range. However, if the Court finds that defendant is a career offender, an armed career criminal, or a repeat and dangerous sex offender as defined under the sentencing guidelines or other federal law, and that finding is not already reflected in the attached worksheets, this paragraph does *not* authorize a corresponding increase in the agreed range.

Neither party may take a position concerning the applicable guidelines that is different than any position of that party as reflected in the attached worksheets, except as necessary to the Court's determination regarding subsections a) and b), above.

3. SENTENCE

The Court will impose a sentence pursuant to 18 U.S.C. § 3553, and in doing so must consider the sentencing guideline range.

A. Imprisonment

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) the sentence of imprisonment in this case may not exceed the top of the sentencing guideline range as determined by Paragraph 2B.

B. Supervised Release

A term of supervised release, if imposed, follows the term of imprisonment. There is no agreement on supervised release. In other words, the Court may impose any term of supervised release up to the statutory maximum term, which in this case is **no less than three and no more than 5 years**. The agreement

concerning imprisonment described above in Paragraph 3A does not apply to any term of imprisonment that results from any later revocation of supervised release.

C. Special Assessment

Defendant will pay a special assessment of **$100.00** and must provide the government with a receipt for the payment before sentence is imposed.

D. Fine

The Court may impose a fine on each count of conviction in any amount up to **$100,000**.

E. Restitution

The Court shall order restitution to every identifiable victim of defendant's offense. The victims, and the full amounts of restitution in this case, will be determined at or before the time of sentence.

F. Forfeiture

As part of this agreement, pursuant to Title 18, United States Code, Section 981(a)(1)(C) as applied by Title 28, United States Code, Section 2461(c), defendant agrees to forfeit without contest, his right, title, and interest in property, real or personal, which constitutes or is derived from proceeds traceable to the conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1349, as alleged in the Indictment.

Pursuant to Fed.R.Crim.P.32.2, defendant agrees to the entry of a personal

money judgment against him in favor of the United States in the amount of the proceeds obtained, directly or indirectly, from the conspiracy offense alleged in the Indictment. Defendant agrees that the forfeiture money judgment may be satisfied, to whatever extent possible, from any property owned or under the control of defendant. To satisfy the money judgment, defendant explicitly agrees to the forfeiture of any assets he has now, or may later acquire, as substitute assets under 21 U.S.C. § 853(p)(2) and waives and relinquishes his rights to oppose the forfeiture of substitute assets under 21 U.S.C. § 853(p)(1) or otherwise.

Defendant agrees to the Court's prompt entry of a Preliminary Order of Forfeiture following defendant's guilty plea, upon application by the United States, incorporating the above referenced forfeiture money judgment as mandated by Fed. R. Crim. P. 32.2, which shall, in any event, be submitted for entry at or before sentencing. Defendant acknowledges that he understands that forfeiture is part of the sentence that will be imposed in this case, and waives any failure by the Court to advise him of this, pursuant to Fed. R. Crim. P. 11(b)(1)(J) or otherwise, at the change-of-plea hearing.

Defendant further agrees to hold the United States, its agents and employees harmless from any claims whatsoever in connection with the forfeiture of property covered by this Plea Agreement. Defendant understands that a 2005 Mercedes Benz, VIN No. WDBSK75F15F106646 has already been administratively forfeited, as

Defendant did not contest the administrative forfeiture of that vehicle.

Defendant waives the requirements of Federal Rule of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, pronouncement of forfeiture at sentencing, and incorporation of forfeiture in the judgment.

In entering into this agreement, defendant knowingly, voluntarily, and intelligently waives any challenge to the forfeiture imposed in this case based upon the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

4. Other Charges:

If the court accepts this agreement, the government will not bring additional charges against defendant based on any of the conduct reflected in the attached worksheets or for other conduct presently known to the government. Following the defendant's guilty plea and sentencing in accordance with this agreement, the government will dismiss all remaining counts in this case.

5. SUBSEQUENT CHALLENGES TO CONVICTION OR BREACH OF AGREEMENT.

A. If at any time defendant tries to withdraw the guilty plea to any count; attacks the validity of the conviction on any count; or fails to comply with the terms of

the agreement, the U.S. Attorney is released from its promises under this agreement and, in particular, may prosecute defendant on any charge that it agreed to dismiss or not to bring. In addition, if defendant's conviction on any count is vacated, the U.S. Attorney may request resentencing on any remaining count.

B. Defendant waives a double jeopardy defense as to any charges the U.S. Attorney brings or pursues under the previous paragraph. Defendant waives any speedy trial or statute of limitations defense for the period of time between the date defendant signed this agreement and (a) the date an order permitting withdrawal of the plea, vacating the plea, or reversing the conviction on any count becomes final, or (b) the date the U.S. Attorney notifies defendant in writing of defendant's failure to comply with the agreement; whichever is later.

6. EACH PARTY'S RIGHT TO WITHDRAW FROM THIS AGREEMENT

The government may withdraw from this agreement if the Court finds the correct guideline range to be different than is determined by Paragraph 2B.

Defendant may withdraw from this agreement, and may withdraw his guilty plea, if the Court decides to impose a sentence higher than the maximum allowed by Part 3. This is the only reason for which defendant may withdraw from this agreement. The Court shall advise defendant that if he does not withdraw his guilty plea under this circumstance, the Court may impose a sentence greater than the

maximum allowed by Part 3.

7. WAIVER OF RIGHT TO APPEAL

If the sentence imposed does not exceed the maximum allowed by Part 3 of this agreement, defendant waives any right he has to appeal his conviction or sentence. If the sentence imposed is within the guideline range determined by Paragraph 2B the government agrees not to appeal the sentence, but retains its right to appeal any sentence below that range.

8. CONSEQUENCES OF WITHDRAWAL OF GUILTY PLEA OR VACATION OF CONVICTION

If defendant is allowed to withdraw his guilty plea or if any conviction entered pursuant to this agreement is vacated, the Court shall, on the government's request, reinstate any charges that were dismissed as part of this agreement. If additional charges are filed against defendant within six months after the date the order vacating defendant's conviction or allowing him to withdraw his guilty plea becomes final, which charges relate directly or indirectly to the conduct underlying the guilty plea or to any conduct reflected in the attached worksheets, defendant waives his right to challenge the additional charges on the ground that they were not filed in a timely manner, including any claim that they were filed after the limitations period expired.

9. PARTIES TO PLEA AGREEMENT

Unless otherwise indicated, this agreement does not bind any government agency except the United States Attorney's Office for the Eastern District of Michigan.

10. SCOPE OF PLEA AGREEMENT

This agreement, which includes all documents that it explicitly incorporates, is the complete agreement between the parties. It supersedes all other promises, representations, understandings, and agreements between the parties concerning the subject matter of this plea agreement that are made at any time before the guilty plea is entered in court. Thus, no oral or written promises made by the government to defendant or to the attorney for defendant at any time before defendant pleads guilty are binding except to the extent they have been explicitly incorporated into this agreement.

This agreement does not prevent any civil or administrative actions against defendant, or any forfeiture claim against any property, by the United States or any other party.

11. ACCEPTANCE OF AGREEMENT BY DEFENDANT

This plea offer expires unless it has been received, fully signed, in the Office of the United States Attorney by 5:00 P.M. on April 11, 2014. The government reserves the right to modify or revoke this offer at any time before defendant pleads guilty.

BARBARA L. MCQUADE
United States Attorney

for CYNTHIA OBERG
Assistant United States Attorney
Chief, White Collar Crimes Unit

GRAHAM TEALL
Assistant United States Attorney

Date: 4/10/14

By signing below, defendant acknowledges that he has read this entire document, understands it, and agrees to its terms. He also acknowledges that he is satisfied with his attorney's advice and representation. Defendant agrees that he has had a full and complete opportunity to confer with his lawyer, and has had all of his questions answered by his lawyer.

(next page)
STEPHON JOHNSON
Attorney for Defendant

Date:

(next page)
STACY MORGAN
Defendant

11. ACCEPTANCE OF AGREEMENT BY DEFENDANT

This plea offer expires unless it has been received, fully signed, in the Office of the United States Attorney by 5:00 P.M. on April 11, 2014. The government reserves the right to modify or revoke this offer at any time before defendant pleads guilty.

BARBARA L. MCQUADE
United States Attorney

CYNTHIA OBERG
Assistant United States Attorney
Chief, White Collar Crimes Unit

GRAHAM TEALL
Assistant United States Attorney

Date:

By signing below, defendant acknowledges that he has read this entire document, understands it, and agrees to its terms. He also acknowledges that he is satisfied with his attorney's advice and representation. Defendant agrees that he has had a full and complete opportunity to confer with his lawyer, and has had all of his questions answered by his lawyer.

STEPHON JOHNSON
Attorney for Defendant

4/11/14

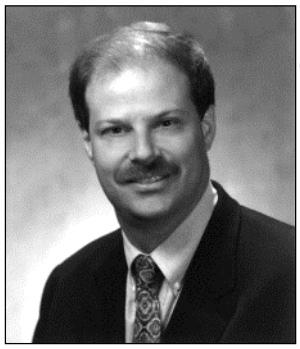
STACY MORGAN
Defendant

EXHIBIT
10

ATTORNEYS' TITLE GUARANTY FUND, INC.

33 North Dearborn ▪ Second Floor ▪ Chicago, Illinois 60602-3100 ▪ Facsimile 312.372.1501 ▪ Telephone 312.372.8361

Special Bulletin



August R. Butera
Senior Vice President and General Counsel

TO: All ATG Members and Regional Agents

FROM: August R. Butera
Senior Vice President and General Counsel

DATE: October 2002

RE: Increase in Real Estate Transaction Fraud Builds Trap for Unwary Lawyers

ATG has obtained information that in recent years that it has closed certain transactions involving misrepresentations by unscrupulous purchasers, appraisers, mortgage brokers, and in some cases, lawyers. These transactions have come to our attention through staff review of files, closers' input, lender and government inquiries, and other sources. In some cases, the fraud has occurred with the knowledge or participation of lawyers involved in the transaction. Lawyers who willingly participate in these transactions have been indicted, convicted, and given substantial jail time. The purpose of this *Special Bulletin* is to illustrate some of the methods employed by the participants and suggest ways in which you can identify a transaction involving fraud so that you can help us prevent these scams. At the same time, we hope to reduce your risk of falling prey to these criminals.

Mortgage fraud is committed in a wide range of creative ways. These schemes involve false appraisals that you may not be able to identify. They almost always involve "insider" (lender, attorney, mortgage broker, appraiser) participation. We hope that as an informed attorney, you will be better able to identify red flags and notify the lender when warning signals are present.

Some of the indicators of misrepresentation include the following:

- *Flip transactions* | A "flip" transaction occurs when a party buys a parcel of property for one price and immediately, or soon thereafter, sells that property to a third party for a much higher price. There is nothing inherently illegal about "flipping" a property. However, if there is a false appraisal or the borrower's loan is obtained through misrepresentation, the "flip" is illegal. End lenders must be notified that they are lending on a transaction that may be an illegal flip. The lender will provide instruction about whether to proceed with the closing. ATG monitors these closings very closely.

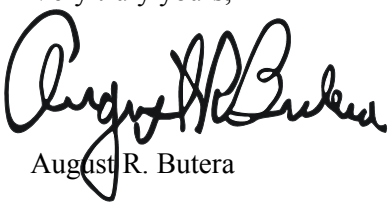
- *Questions relating to the identity of the borrower* | Identity theft is the newest and most common scheme to defraud lenders. These schemes usually involve a false appraisal and, in many cases, will direct payment to parties not previously identified in the transaction or payoffs to lien holders not reflected on the title commitment. This third party will many times be a purported construction company or some shell corporation through which the funds are funneled. Any time the name of the buyer changes at the last minute, you should notify the lender.

- *Buyers purchasing multiple properties within a short period of time* | Most buyers are not able to purchase multiple properties within a short period of time. Many times they simultaneously apply for loans with multiple lenders on multiple properties and do not inform the lenders of the multiple obligations. Because the purchases happen within weeks or days, the credit records will not reflect new purchases and mortgages.

- *Silent second mortgage* | In this scheme, a seller or other interested party takes a second mortgage for part or all of the down payment at the time of the closing without the lender's knowledge. Most lenders will not allow a closing to occur involving a second mortgage of which they were unaware.
- *Buyers not represented by counsel* | If there are other indicators of misrepresentation, this may confirm your suspicions.
- *Fake drivers license or ID cards* | Although the authenticity of identification cards may be very difficult to verify, there are many situations where the information regarding the buyer, including the address and date of birth, are suspect and indicate that a document may not be authentic.
- *Changes in the real estate contract* | This is of particular concern if the purchase price is being amended or if the contract is being assigned from one buyer to another.
- *Even dollar amounts* | Even dollar amounts on liens being paid off should be considered a strong warning signal.
- *Payments to third parties* | "Pay proceeds letter" from the seller directing payments to a third party that have nothing to do with the transaction should be considered a "red flag."
- *Keeping the attorney out of the loop* | The mortgage broker has arranged the deal and is communicating with both the seller and the buyer. Usually the seller tells his/her attorney that they have changed certain terms of the deal, but that the attorney doesn't need to review those changes.
- *Suspicious checks* | The mortgage broker is getting a very large check or is taking a check to a third party who is not a party to the transaction and does not have a recorded lien on the property.

We are planning to incorporate discussions on mortgage fraud into upcoming seminars for members and closers. With your help, we can stop these criminals from artificially increasing property values and, in so doing, undermining the integrity of the housing industry and ultimately harming the consumers we serve.

Very truly yours,



August R. Butera

Warren Laird, Assistant Vice President and Regional Counsel
CHICAGO TITLE INSURANCE COMPANY
TICOR TITLE INSURANCE COMPANY
SECURITY UNION TITLE INSURANCE COMPANY
100 Corporate Ridge, Suite 120, Birmingham, AL 35242 PHONE (205) 980-7485, (800) 678-4267; FAX (205) 980-7490

BULLETIN

TO: All agents in AL, AR, LA & MS
FROM: Warren Laird, AVP & Regional Counsel
SUBJECT: FLIP TRANSACTIONS
DATE: 08/12/02

A. Introduction

A "flip transaction" involves the purchase of real property and an immediate resale or "flip" of the same real property at a significantly higher price, usually the same day. The purchase and resale is financed almost exclusively with the funds provided by a lender in the second, or "flip," transaction. This continues to be a popular method of acquiring and disposing of real property.

There are many pitfalls and problem areas of a "flip transaction" which are beyond the scope of this Bulletin. Suffice it to say, however, that when a "flip transaction" goes bad, the ultimate lender may have been defrauded as well as the ultimate purchaser.

B. What to Look For

If the information in the file reveals any of the following conditions, you should contact me to get approval before proceeding with the transaction:

a) There was a transfer of ownership within the previous twelve months; **and**
b) It appears there is an increase on the current sales price in excess of the greater of $50,000 or 30% without substantial improvements by the seller or market conditions that would account for the increase; **or**
c) The prior sale involved the same or closely related parties, entities or principals of entities including but not limited to corporations, partnerships, joint ventures, limited liability companies; **or**

d) The prior sale involved the same mortgage broker, real estate broker, licensee or appraiser; **or**
e) The record discloses no new financing at the time of the prior transfer.

The above conditions do not mean that the transaction is in any way improper. They are merely indicators that further review of the transaction is warranted.

D. Requisite Action: Disclosure!!

You should follow the lender's instructions as to disclosure of prior transfers. Closing instructions and instruction letters should be carefully reviewed as many lenders have recently added requirements concerning this issue. Failure to be aware of these new requirements can and has resulted in liability for the Company under insured closing letters.

If the lender's instructions do not contain any requirements for disclosure, then disclose all title transfers within the last 6 months within Schedule B of the Commitment using the following language:

> **The following note is for informational purposes only:**
>
> **The following deed(s) affecting said land were recorded within six (6) months of the date of this report:**
>
> ***Grantor***
> ***Grantee***
> ***Recorded:*** ***Book, Page***

In those transactions in which a commitment is not being issued or in which the lender never sees the commitment, you should make a separate written disclosure to the lender.

Should you have any questions as to this Bulletin's content or how it impacts your agency, please do not hesitate to call me.

Bulletin : FL000068

Date: July 20, 2005

From: Stewart Title Guaranty Company
P. O. Box 2029
Houston, Texas 77252-2029
(800) 729-1902

To: All Stewart Title Offices and Agents in Florida

RE: Flip Transactions

Dear Associates:

There appear to be a great many "flip transactions" taking place in Florida these days and from a claim prospective they are a cause of much concern. A flip transaction is not necessarily fraudulent nor illegal buy many flip transactions are both. You must use care to be certain that you are following closely all closing instructions from a lender which may be involved in a flip transaction and you must also make sure that your title commitment and your HUD 1 accurately disclose the essential details of the transaction.

In Schedule A of the commitment, you must show the actual current record title holder. Some commitments have been prepared showing the middle man, that is, the party who is acquiring the property and turning it over in the flip transaction, as being the owner of record. He is not. The holder of record is the current owner notwithstanding what is contemplated in the flip.

In Schedule B requirements, you must specifically recite that a deed is required from the present owner to the middle man and additionally a deed form the middle man to the ultimate planned owner. In this manner, the nature of the flip transaction and its correct details are disclosed to the lender who will, therefore, not be in a position to complain at a later date that they were not aware of the circumstances.

As to the HUD 1, there must be two separate HUD 1's, one for each of the two transactions taking place. If there is no actual cash being brought in by the middle man to acquire the property but the cash in that transaction is actually being funded by the loan put in place for the second transaction,

the HUD 1 should accurately reflect the same preferably by reciting right after the line provided for cash down payment a cross reference to the HUD 1 on the second transaction. Therefore, it is disclosed to the bank that the equity in the first transaction may have been theoretical and if this is acceptable to them, there is no problem. It is our duty to disclose. Again, that way if the ultimate purchaser of the property is not actually bringing in cash but his equity is on a profit from the earlier transaction, this has been disclosed to the lender.

A flip transaction based on someone's ability to locate a bargain price on a distressed property and to bring about a resale of that property before actually taking title is not illegal. The problem with many flip transactions if failure to disclose the circumstances to the lender, the use of inflated appraisals and the use of strawmen for the intermediate transaction who do not actually exist.

It is also important to be aware that if a bank suffers a loss on a flip transaction because of nondisclosure of the circumstances, and if there is, in fact, no defect in the title work involved, it may be the agent alone who bears liability to the bank as the resulting claim may not relate to a title insurance defect.

On the other hand, if the title underwriter is held liable to the lender due to the closing agent's failure to follow closing instructions or to misapplication of the lender's funds, you need to be aware that the underwriter will look to the agent.

THIS BULLETIN IS FURNISHED TO INFORM YOU OF CURRENT DEVELOPMENTS. AS A REMINDER, YOU ARE CHARGED WITH KNOWLEDGE OF ALL CONTENT ON VIRTUAL UNDERWRITER AS IT EXISTS FROM TIME TO TIME AND ANY OTHER INSTRUCTIONS. OUR UNDERWRITING AGREEMENTS DO NOT AUTHORIZE OUR ISSUING AGENTS TO ENGAGE IN SETTLEMENTS OR CLOSINGS ON BEHALF OF STEWART TITLE GUARANTY COMPANY. THIS BULLETIN IS NOT INTENDED TO DIRECT YOUR ESCROW OR SETTLEMENT PRACTICES OR TO CHANGE PROVISIONS OF APPLICABLE UNDERWRITING AGREEMENTS. CONFIDENTIAL, PROPRIETARY, OR NONPUBLIC PERSONAL INFORMATION SHOULD NEVER BE SHARED, OR DISSEMINATED EXCEPT AS ALLOWED BY LAW. IF APPLICABLE STATE LAW OR REGULATION IMPOSES ADDITIONAL REQUIREMENTS, YOU SHOULD CONTINUE TO COMPLY WITH THOSE REQUIREMENTS.

References

Bulletins Replaced : None

Related Bulletins : None

Underwriting Manual : None

Exceptions Manual : None

Forms : None

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

FLORIDA BULLETIN 99-4

TO: ALL OLD REPUBLIC AGENTS AND BRANCH OFFICES

FROM: UNDERWRITING DEPARTMENT

DATE: JUNE 4, 1999

RE: "FLIP" TRANSACTIONS

In recent months, we have been hearing more and more about real estate transactions that are commonly known as "flips." The typical transaction involves three basic players:

"A," the seller of the property in question;
"B," the purchaser from A; and
"C," the ultimate purchaser of the property.

The fourth player is of critical concern, "C's" lender.

There are several scenarios under which a transaction involving A, B and C might take place.

- The contract or agreement between A and B is closed with A conveying the property to B. Thereafter, the contract or agreement between B and C is closed and B conveys the property to C.

- The contract or agreement between A and B is properly assigned to C, and the closing takes place under that agreement with A conveying to C.

Variations of these two scenarios create a great deal of difficulty for the closing office and underwriter. Occasionally, under the first scenario, a closing takes place where the money necessary to close the transactions actually comes from C, and there are no funds available to close the transaction between A and B. In these situations, the HUD-1 closing statements cannot and do not match up with the actual checks disbursed. When the HUD-1 is false, the closing agent is extraordinarily exposed.

Another problem scenario involves a lack of disclosure among the parties and, eventually, property values that are excessively inflated. C's lender may be unaware of the agreement between A and B. Failure to notify the lender of that transaction may very well be a violation of that lender's general closing instructions.

The purpose of this Bulletin is to enumerate those circumstances under which this Company is willing to underwrite "flip" transactions. You are authorized to issue a title insurance commitment or policy on this Company involving these types of transactions **only** under the following circumstances:

1. The approved transaction is closed under the first scenario set forth above with A conveying to B and B conveying to C, so long as a commitment is issued and a premium is collected on the conveyance from A to B. The commitment must show title vested in A and must require the conveyance from A to B. Further, the transaction between A and B must stand on its own with B providing the necessary funding for that transaction as reflected in a proper and complete settlement statement. Likewise, the second part of the transaction between B and C must be properly documented. The second commitment should show title vested in A and require a conveyance from A to B as well as a conveyance from B to C. Premiums should also be collected on the latter conveyance. All disclosures required by any lender involved must be made and must be clearly documented in the agent's file.

2. Alternatively, the approved transaction must be one as reflected in the second scenario above, whereby the contract between A and B is properly assigned to C so that C now owns the contract. A copy of a typical assignment of contract is attached for your information. The requirement for an assignment of contract must appear in the commitment. This transaction must be properly documented by way of the settlement statement, and that statement must reflect all deposits and payments, including the payment due to B on the Assignment of Contract. Again, necessary disclosures to the lenders and other appropriate parties must be made

In each of the situations immediately described above, the settlement statement(s) must accurately reflect the transactions. Cancelled checks must match the disbursement items shown on each closing statement.

Should you have any reason to believe that **any** transaction is not ***bona fide*** and ***arms-length***, you should not issue this Company's commitment or policy without authority from our Underwriting Department. Please contact us with any questions or comments you might have.

ASSIGNMENT OF CONTRACT

KNOW ALL MEN BY THESE PRESENTS that _____ of _____ County, State of _____, party of the first part, in consideration of the sum of _____ ($_____) Dollars, and other valuable considerations to me in hand paid by _____ of the County of _____, State of _____, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the party of the second part, his heirs and assigns, forever, a certain land contract bearing date of the _____ day of _____, 19____, made by _____ upon the following described piece or parcel of land, situate and being in the County of _____, State of _____, to-wit:

(legal description)

A portion of the consideration of this assignment being that the party of the second part herein assumes all the obligations and agrees to pay all the payments described in said contract now due or to become due, together with all interest specified in said contract.

And upon the performance of all the terms and conditions and the completion of all payments as set forth in said contract, by the said party of the second part, _____, his heirs and assigns, the party of the first part does hereby authorize the said _____ to make, execute and deliver a good and sufficient deed to the property hereinabove described, in like manner as though the original contract had been made and executed by the said _____ with the said party of the second part, instead of with _____.

To have and to hold the same unto the said party of the second part, his heirs, and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the _____ day of _____, 19____.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

_____	_____
Witness	Signature
_____	_____
Printed Name	Printed Name
_____	_____
Witness	Signature
_____	_____
Printed Name	Printed Name

EXHIBIT
11

1 of 2 DOCUMENTS

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR BANKUNITED, F.S.B., Plaintiff, vs. PROPERTY TRANSFER SERVICES, INC., a Florida Corporation, FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, and DOES 1 Through 40, Defendants.

CASE NO.: 12-80533 -CV-MIDDLEBROOKS/BRANNON

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

2013 U.S. Dist. LEXIS 144663

October 4, 2013, Decided
October 7, 2013, Entered on Docket

PRIOR HISTORY: *FDIC v. Property Transfer Servs., 2013 U.S. Dist. LEXIS 137442 (S.D. Fla., May 15, 2013)*

COUNSEL: [*1] For Federal Deposit Insurance Corporation, as Receiver for BankUnited, F.S.B., Plaintiff: George Thomas Breur, Robert Allen Hingston, LEAD ATTORNEYS, Heather Marie Jonczak, Welbaum Guernsey, Coral Gables, FL; Orlando J. Villalba, LEAD ATTORNEY, Dana J. Clausen, Michael H. Delbick, Paul A. Levin, PRO HAC VICE, Mortgage Recovery Law Group, Glendale, CA;Lindsey Fallon Thurswell, Welbaum Guernsey Hingston Et Al, Coral Gables, FL; Michael Jay Rune, II., Welbaum Guernsey Hingston Greenleaf & Gregory, Miami, FL.

For Property Transfer Services, Inc., a Florida corporation, Defendant: Charles Dominic Thomas, LEAD ATTORNEY, Thompson & Thomas PA, West Palm Beach, FL.

For First American Title Insurance Company, a California corporation, Defendant: Charles D. Price, LEAD ATTORNEY, PRO HAC VICE, Brouse, McDowell, LPA, Cleveland, OH; John C. Fairweather, Lisa S. DelGrosso, Lucas M. Blower, Nicholas P. Capotosto, LEAD ATTORNEYS, PRO HAC VICE, Brouse McDowell, LPA, Akron, OH; Terrence Russell, LEAD ATTORNEY, Stephen Carey Villeneuve, Fowler White Boggs, Fort Lauderdale, FL.

For First American Title Insurance Company, a California corporation, Cross Claimant: Charles D. Price, LEAD ATTORNEY, PRO HAC VICE, **[*2]** Brouse, McDowell, LPA, Cleveland, OH; Lucas M. Blower, LEAD ATTORNEY, PRO HAC VICE, Brouse McDowell, LPA, Akron, OH; Terrence Russell, LEAD ATTORNEY, Stephen Carey Villeneuve, Fowler White Boggs, Fort Lauderdale, FL.

JUDGES: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: DONALD M. MIDDLEBROOKS

OPINION

OPINION AND ORDER

THIS CAUSE comes before the Court for final disposition of the issues presented during a bench trial

held from August 12, 2013 through August 14, 2013. [1] Plaintiff Federal Deposit Insurance Corporation ("FDIC"), as receiver for BankUnited, F.S.B. ("Old Bank"), asserts that Defendant First American Title Insurance Company ("First American") is required to indemnify the FDIC pursuant to two closing protection letters ("CPLs") [2] First American issued as a result of its agent's, Property Transfer Services, Inc. ("PTS"), actions in regards to the closing [3] of two residential properties. [4]

1 After oral arguments held on August 14, 2013, the Court allowed the Parties to submit Post-Trial Briefs in this matter. Plaintiff Federal Deposit Insurance Corporation submitted its Post-Trial Brief (DE 210) on August 21, 2013 and Defendant First American Title Insurance Company submitted its Post-Trial **[*3]** Brief (DE 211) on August 23, 2013.

2 A CPL offers lenders indemnification "against damages arising out of certain claims which they may have against the agent of the title insurance company when a policy is to be issued, including protection against fraud and dishonesty of the issuing agent . . . in handling the lenders' funds or documents in connection with a closing." Shawn G. Rader, *Closing Protection Letters, 70 FLA. BAR J. 38, 38 (Dec. 1996)*. CPLs issued in Florida are legislatively mandated. *See FLA. STAT. § 627.786*. *Rule 69O-186.010 of the Florida Administrative Code* provides the language that must be included in a CPL. *See FLA. ADMIN. CODE ANN r. 69O-186.010* (1991).

3 A "closing" is "the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred." *Black's Law Dictionary* 291 (9th ed. 2009).

4 On August 12, 2013, the first day of the trial, PTS and the FDIC informed the Court that they had settled the issues as between them. (Trial Tr. vol. 1, 6:11-20, Aug. 12, 2013). Under the terms of their settlement, PTS agreed to a stipulation for judgment in the amount of $400,000. That amount would be reduced by any **[*4]** judgment amount entered against First American. Regardless of the judgment against First American, PTS is required to pay at least $35,000. *Id.* at 9:7-13. PTS was excused from the trial proceedings. *Id.* at 9:17-23.

This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to *Federal Rule of Civil Procedure 52(a)*. All proposed findings of fact and conclusions of law inconsistent with those set forth herein are rejected.

I. BACKGROUND

The instant case involves the sale of two separate pieces of property in May 2007: 2401 Northeast 65th Street, 1-206, Fort Lauderdale, FL ("Unit 206"), and 2401 Northeast 65th Street, 1-308, Fort Lauderdale, FL ("Unit 308"). Old Bank provided two mortgage loans (collectively, "Loans") on the condition that the buyer, Nathaniel Ray ("Ray"), deliver a cash payment at each closing [5] and a mortgage on each property. [6] First American provided title insurance for the Loans, with PTS acting as First American's designated agent. PTS was the title, escrow, and closing agent [7] for the two mortgages. Old Bank issued Loan Closing and Funding Instructions ("Closing Instructions") to PTS for each loan that provided an explanation of how PTS should **[*5]** conduct the closing. On April 30, 2007, First American issued two CPLs to Old Bank and its successors that required First American to reimburse Old Bank for any actual loss incurred as a result of PTS's failure to comply with the Closing Instructions, [8] or PTS's fraud or dishonesty in handling Old Bank's funds or documents.

5 As to Unit 206, Mr. Ray was to provide $36,476.10. For Unit 308, Mr. Ray was to pay $35,952.96.

6 Old Bank offered Mr. Ray a mortgage loan totaling $274,500.00 for each property.

7 A "closing agent" "handl[es] financial calculations and transfers of documents" during the closing. *Black's Law Dictionary* 74.

8 Under the CPLs, First American would have to indemnify Old Bank when PTS's failure to follow the Closing Instructions relates to: (1) the status of the title or the validity, enforceability, and priority of the lien of the mortgage; (2) the obtaining of documents Old Bank required; or (3) the collection and payment of Old Bank's funds. (*See* CPL dated Apr. 30, 2007, Trial Exh. J-57, J-58).

A. *Sale of the Two Properties*

The sale of Unit 206 and Unit 308 involved a mortgage fraud scheme involving a straw buyer who misrepresented his income, a down payment made by the

seller **[*6]** with the lender's funds, an inflated appraisal, and a closing agent who turned a blind eye and allowed the fraud to occur. In 2007, Mr. Ray, then a firefighter, was approached by his colleague Craig Turturo about buying Unit 206 from Kamel and Elizabeth Albert and Unit 308 from Brian Albert. [9] (Trial Tr. Vol. 1, 50:8-13 (Ray)). Craig Turturo, whose testimony I find not credible, claimed to be simply helping out a friend, but I believe served as a key member of this scheme. Mr. Ray and Craig Turturo "worked out a deal" whereby Mr. Ray would buy the properties, secured with residential loans, but the sellers of the properties would provide the down payments. *Id.* at 50:14-18.

9 Kamel and Elizabeth Albert are Brian Albert's parents. Brian Albert testified during the trial and invoked his *Fifth Amendment* right against self-incrimination in response to questions regarding the disputed transactions. (*See* Trial Tr. vol. 1, 103:15-107:10). Mr. Ray, Craig Turturo, and Kamel, Elizabeth, and Brian Albert are not parties in the instant suit.

The appraisals for the units were done by Frank Turturo, Jr., son of Frank Turturo, Sr. and Craig Turturo's brother. *Id.* at 115:21-116:1. U.S. Mortgage Bankers **[*7]** [10] secured the financing for the Loans on Mr. Ray's behalf through Old Bank. Old Bank offered Mr. Ray two Stated Income/Stated Asset loans whereby Mr. Ray claimed an exaggerated annual income on the loan applications without providing any verification of that income to receive the Loans. (*See* BankUnited Mortgage, Trial Exh. J-15, J-20). In addition, U.S. Mortgage Bankers, based on a referral by Frank Turturo, Sr., (Trial Tr. vol. 1, 114:1-17, 138:7-21, 200:17-201:1), presented the purchase and sale transactions to PTS. [11] Frank Turturo, Sr., Craig Turturo's father, was an independent sales representative for PTS. *Id.* at 113:22-114:5. For both of the sales transactions, PTS was tasked with ensuring the Closing Instructions were followed, including proper execution of closing documents and distribution of funds. Nicole Bensema ("Bensema") was the PTS closing manager responsible for overseeing the closings.

10 U.S. Mortgage Bankers is Frank Turturo, Sr.'s client.

11 Christopher Albert worked at U.S. Mortgage Bankers. Christopher Albert is Brian Albert's brother and Kamel and Elizabeth Albert's son.

According to the United States Department of Housing and Urban Development Settlement Statement **[*8]** ("HUD-1") for each property, Mr. Ray, Kamel and Elizabeth Albert, and Leila Santa, a PTS closing agent Ms. Bensema supervised, signed the paperwork for Unit 206 on May 14, 2007. (HUD-1, Trial Exh. J-2). Mr. Ray and Brian Albert and Ms. Bensema signed the closing documents for Unit 308 on May 16, 2007. (HUD-1, Trial Exh. J-5). [12]

12 Mr. Ray testified that he remembers attending only one closing to sign the paperwork for both properties. (Trial Tr. vol. 1, 52:19-21 (Ray)).

Line 303 of the HUD-1s, as certified by the PTS closing agents, stated that the Borrower, Mr. Ray, provided cash at the closing. *Id.* However, Mr. Ray did not bring cash or a cashier's check with him to the closings. On May 15, 2007, one day after the HUD-1 for Unit 206 was executed, Masterhost, Inc. ("Masterhost"), a third party corporation, wired $36,476.10 to PTS "FBO Nathanial Ray," meaning "for the benefit of Mr. Ray. [13] (PTS's Current Day Wire Report, Trial Exh. J-26). On May 16, 2007, Masterhost transferred another wire for the benefit of Mr. Ray to cover the down payment in the Unit 308 sale for $35,952.96. (PTS's Current Day Wire Report, Trial Exh. J-27). Masterhost was not affiliated with Mr. Ray and Mr. Ray **[*9]** did not give PTS any reason to believe that there was a connection between Masterhost and himself. (Trial Tr. vol. 1, 53:13-21 (Ray)). Although Mr. Ray was to pay the $72,429.06 from his own funds at closing to buy the properties, he provided no funds at all, contrary to the Closing Instructions that listed the "loan-to-value" rate [14] of 90% for Mr. Ray's Loans. He testified that he never intended to make any down payment and would not have purchased the property if he had to use his own money. *Id.* at 53:10-12.

13 Masterhost was owned by Christopher Albert, who, as noted previously, is related to the property sellers.

14 The "loan-to-value" rate compares the amount of the loan to the value of the property. Mr. Ray's loan-to-value of 90% entitled him to a loan equaling no more than 90% of the value of the property. With a sales contract price of $305,000 for each unit, Mr. Ray had to pay at least $30,500, as down payment with his own funds, to comply with the 90% loan-to-value rate.

The same day that Mr. Ray signed the closing documents, he met with and received the keys to the properties from Craig Turturo. *Id.* 52:8-15.

B. ***Mr. Ray's Default on the Mortgage Loans***

Mr. Ray defaulted on the Unit **[*10]** 206 and Unit 308 mortgages on November 1, 2007. Old Bank commenced foreclosure proceedings against Unit 206 in June 2008. New Bank [15] obtained a decree of foreclosure finding in June 2009 and obtained title to Unit 206 in a foreclosure sale in August 2009. New Bank sold the property for $85,029.49 and received $71,361.74 from the sale in January 2010. The unpaid principal balance was $278,904.90, unpaid interest was $38,917.70, and the taxes, insurance, and other expenses amounted to $19,589.80. [16]

15 Old Bank closed in May 2009 and the FDIC was appointed its receiver. The FDIC entered into a Purchase and Assumption Agreement and Loss Share Agreement ("P&A Agreement") with BankUnited ("New Bank") on May 21, 2009. (*See* P&A Agreement, Trial Exh. D2-80). Under the P&A Agreement, the FDIC paid New Bank $4 billion to accept Old Bank's loans as a unit, including the Loans at issue in this matter, other assets, and liabilities. (*See* Trial Tr. vol. 2, 63:2-15 (Newbold)).

16 These amounts reflect the FDIC's updated principal and interest amount, which it modified to reflect the Loans' adjustable interest rates. (*See* Trial Tr. vol. 1, 232:22-233:1 (Newbold)).

In April 2008, Old Bank initiated foreclosure **[*11]** proceedings against Unit 308. It received a finding that it had the first priority mortgage in October 2008. Old Bank received title in a foreclosure sale in November 2008. In March 2009, Old Bank received a $79,012.82 check in connection with a private mortgage insurance claim caused by the Borrower's default on the Unit 308 loan. New Bank sold the property in September 2009 for $90,000 and received $72,762.29 in the sale. The unpaid principal balance was $278,904.90, unpaid interest was $25,468.15, and the taxes, insurance, and other expenses amounted to $3,774.31.

C. ***Notice and Filing of Lawsuit***

The FDIC issued an administrative subpoena upon PTS on March 15, 2012 requesting that PTS produce all its documents relating to the Ray Loans. PTS produced the requested documents on April 11, 2012. The FDIC submitted a claim to First American under the CPLs on April 19, 2012. The FDIC filed the instant lawsuit on May 17, 2012, after First American had not responded to the FDIC's claim. The FDIC's Complaint alleges two counts for each of the Loans of breach of contract (Counts I and V), breach of fiduciary duty (Counts II and VI), and negligent misrepresentation (Counts III and VII) against **[*12]** PTS and two counts of breach of contract (Count IV and VIII) against First American for the two Loans. [17]

17 As previously explained, *see supra* note 4, PTS and the FDIC reached a settlement on the breach of contract (Counts I and V), breach of fiduciary duty (Counts II and VI) and negligent misrepresentation (Counts III and VII) claims against PTS in this matter. Therefore, I need only address Counts IV and VIII, the two breach of contract claims against First American.

The FDIC contends that PTS's failure to follow Old Bank's Closing Instructions for the Ray Loans and PTS's dishonesty resulted in damage to Old Bank. Because of PTS's conduct, First American is required to indemnify the FDIC, as Old Bank's receiver, in accordance with the CPLs. The FDIC alleges that it has standing to assert the CPL claims against First American and that First American breached its contractual obligations by refusing to reimburse the FDIC for its loss. The FDIC is seeking damages.

First American alleges that the FDIC is barred from bringing its claims because: (1) the FDIC does not have standing to assert the claims under the CPL; (2) its action is barred by the CPL's 90-day notice provision; [18] and (3) **[*13]** the violation of the Closing Instructions alleged do not fall within any of the specifically defined scenarios listed in the CPLs. Furthermore, First American contends that any loss suffered by Old Bank is not attributable to any misconduct on the part of PTS, and that not enough evidence exists to calculate any damages.

18 First American argues that the CPLs bar recovery unless it receives written notice of a loss within ninety days from the date of discovery of such loss. Under the 90-day notice provision of the CPLs as provided in paragraph D,

> Claims of loss shall be made

> promptly to [First American . . . .] When the failure to give prompt notice shall prejudice [First American] liability of the First American Title Insurance Company hereunder shall be reduced to the extent of such prejudice. [First American] shall not be liable hereunder unless notice of loss in writing is received by [First American] within ninety (90) days from the date of discovery of such loss.

(CPL dated Apr. 30, 2007, Trial Exh. J-57 at 2, J-58 at 2).

II. LEGAL ANALYSIS

A. *Standing*

First American argues that the FDIC does not have standing to assert a CPL claim because: (1) the rights offered by the CPLs run with **[*14]** the land and the FDIC no longer holds the mortgages; (2) even if the CPLs' protections did not run with the land, the FDIC did not retain those rights in its P&A Agreement with New Bank; and (3) even if the FDIC retained its CPL rights, its claims are time-barred because it did not provide notice within the ninety days required by the CPLs. The FDIC argues that: (1) the CPLs' language does not require the FDIC to hold the Loans to bring a claim; (2) under Section 3.5 of the P&A Agreement, [19] it successfully carved out and retained its CPL rights after the Loan transfers; and (3) the FDIC complied with the CPL's 90-day notice provision.

19 Section 3.5 reads, in pertinent part:

> **Assets Not Purchased by Assuming Bank**. The Assuming Bank does not purchase, acquire or assume, or (except as otherwise expressly provided in this Agreement) obtain an option to purchase, acquire or assume under this Agreement: . . .
>
> (b) any interest, right, action, claim, or judgment against . . . (i) . . . [any] Person . . . retained by the Failed Bank . . . arising out of any act or omission of such Person in such capacity, (ii) any underwriter of financial institution bonds, banker's blanket bonds or any other **[*15]** insurance policy of the Failed Bank, . . . or (iv) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank; provided, that for the purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when any such claim is discovered and regardless of whether any such claim is made with respect to a financial institution bond, banker's blanket bond, or any other insurance policy of the Failed Bank in force as of Bank Closing.

(P&A Agreement, Trial Exh. D2-80 at 13-14) (emphasis in original).

To determine whether the FDIC has standing to bring its claims against First American, I must interpret the CPLs and P&A Agreement's language. In construing the language of a contract, courts must look to the plain meaning and may only consider extrinsic evidence when the language is ambiguous. "[W]here the essential terms of a contract are unambiguous the court will not look beyond the four corners of the document to determine the parties intent.'" *See Ellinger v. United States, 470 F.3d 1325, 1338 (11th Cir. 2006)* **[*16]** (internal quotation marks omitted); *see also Taylor v. Taylor, 1 So. 3d 348, 350 (Fla. 1st Dist. Ct. App. 2009)* (citing *Royal Oak Landings Homeowners Ass'n v. Pelletier, 620 So. 2d 786, 788 (Fla. 4th Dist. Ct. App. 1993))* ("Contract interpretation begins with a review of the plain language of the agreement because the contract language is the best evidence of the parties intent at the time of the execution of the contract."). Therefore, I will assess the plain meaning of the CPLs and P&A Agreement's language to determine the FDIC's standing in the instant matter.

(1) *Standing under the CPLs*

First American claims that the CPL's language requires that the party seeking reimbursement hold the mortgage secured by an interest in land when filing the CPL claims; its argument rests on the belief that the CPL contractual rights "run with the interest in the land." First American contends that once the FDIC transferred the Loans to New Bank, the FDIC lost its standing to bring a CPL claim. The FDIC argues that the CPLs do not contain a requirement that a claimant retain its interest in the land secured by a mortgage in order to bring a CPL claim and that it retained its CPL rights through **[*17]** the carve-out provision in the P&A Agreement.

The CPLs are an agreement between the title insurance underwriter and the lender that the lender may rely on to ensure it will be reimbursed for the misconduct of the title insurance underwriter's agent during the closing. *See Fito v. Attorney's Title Ins. Fund, Inc., 83 So. 3d 755, 757 n.2 (Fla. 3d Dist. Ct. App. 2011)*. Pursuant to the CPLs addressed to Old Bank and "ISAOA," meaning "Its Successors And/Or Assigns,"

> When title insurance of First American . . . is specified for your protection in connection with closings of real estate transactions in which you are to be . . . a lender secured by a mortgage . . . of an interest in land, . . . First American . . . hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by [PTS], when such loss arises out of PTS's failure to comply with Old Bank's Closing Instructions [20] or PTS's fraud or dishonesty in handling Old Bank's funds or documents in connection with the closing.

(CPL dated Apr. 30, 2007, Trial Exh. J-57 at 1, J-58 at 1). Under the plain reading of the CPL, only a party who: (1) will be receiving title insurance from First American **[*18]** in connection with a closing; (2) will be a lender of a mortgage secured by an interest in land; and (3) will have PTS as its closing agent will obtain CPL contractual rights and will be reimbursed for losses in connection with the acts of the closing agent. When First American issued the CPLs, Old Bank: (1) was to receive title insurance from First American in connection with the Unit 206 and 308 closings; (2) would become a lender secured by a mortgage of an interest in land; and (3) would have PTS as its closing agent. If PTS failed to comply with the Closing Instructions or committed fraud or dishonesty during the closings, First American would reimburse Old Bank. The CPLs' emphasis is on the closing and PTS's participation during the closing.

> 20 PTS's failure to comply with the Closing Instructions must relate to: (1) the status of the title or validity, enforceability, and priority of the lien; (2) obtaining of documents specifically required by Old Bank; or (3) the collection and payment of funds due to Old Bank. (CPL dated Apr. 30, 2007, Trial Exh. J-57 at 1, J-58 at 1).

The purpose of language regarding "a lender secured by a mortgage . . . of an interest in land" is to describe **[*19]** the party receiving the indemnification protection, i.e., one who will be receiving an interest in land. It does not impose a requirement that the party with a CPL contractual right continue to hold that interest in order to submit a CPL claim, and it does not state that the party's rights are extinguished upon transfer of the mortgage. To read the CPL's language as requiring the claimant to hold the interest in the land would require the Court to insert a

limitation where the language of the CPL does not require doing so.

By way of comparison, I reviewed the language of the Title Insurance Policy ("Policy") First American issued to Old Bank. (First American's Lender Policy, Trial Exh. D2-42, D2-56). The Policy provides that First American "insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained" because of the invalidity or unenforceability of the lien and loss of priority of the lien. *Id.* at FDIC002081. By using the present tense, the quoted language demonstrates that the Policy only covers the owner of the loan secured by a mortgage in an interest in land. Under the plain reading of the Policy, it would be difficult for a potential claimant **[*20]** to argue, without more, that it retained the Policy's protections after it transferred a loan associated with the Policy to another party. However, the CPLs at issue in this matter do not contain that narrowing language. Instead, it promises to indemnify a future lender secured by a mortgage of an interest in land.

First American claims that only New Bank would have a right to file a CPL claim, even though the FDIC and New Bank agreed that the FDIC would retain that right through their P&A Agreement carve-out. In *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co., 795 F.Supp.2d 624 (E.D. Mich. 2011)* (hereinafter, "*Chase*"), the court had to determine the same question presented here: whether the FDIC had standing to pursue its CPL claims under a similar "carve-out" provision. The court found that the FDIC, as the appointed receiver, had retained its CPL contractual rights via the carve-out after it sold the loan and title insurance policy and did have standing to bring a CPL claim. The court reviewed the language of the CPL to find that: (1) the FDIC stepped into the original mortgage holder's "shoes by operation of law and acquired the former holder's rights under the CPL; (2) [t]here **[*21]** [was] no provision in the CPL [that] provide[d] that the original holder would lose its indemnification rights if it subsequently sold" the loan; and (3) the "FDIC did not forfeit [the original holder's] protections under the CPL." *Chase, 795 F.Supp.2d at 631*.

I find the *Chase* court's findings applicable to the situation presented here. First American issued the CPLs to Old Bank and its successors and assigns. The FDIC stepped into Old Bank's shoes as receiver and acquired Old Bank's CPL rights. The CPLs do not state that Old Bank would lose its indemnification rights if it transferred or sold the Loans. Therefore, the FDIC did not forfeit Old Bank's CPL protections when it transferred the Loans to New Bank and the FDIC continues to hold those indemnification rights.

The CPL's language does not support First American's interpretation that the CPL runs with the interest in the land. Therefore, I find that the CPLs do not impose a requirement that a claimant retain its mortgage in order to bring CPL claims and that the FDIC, as Old Bank's receiver, has standing to bring a claim under the language of the CPLs. [21]

> 21 In support of its argument that the FDIC lacks standing, First American cites **[*22]** to the findings in a Report and Recommendation ("R&R") for the case of *FDIC as Receiver for BankUnited, FSB v. Floridian Title Group, Inc., and First Am. Title Ins. Co., No. 12-cv-21890, 2013 U.S. Dist. LEXIS 136000 (S.D. Fla. July 24, 2013)* (hereinafter, "*Floridian Title*"). Citing to *Wall Street Mortgage Bankers, Ltd. v. Attorneys' Title Insurance Fund, Inc., No. 08-cv-21648, 2009 U.S. Dist. LEXIS 132890 (S.D. Fla. Sept. 9, 2009)*, the court in *Floridian Title* found that the CPL ran with the interest in land, and that this "render[ed] the FDIC's carve-out futile." *Floridian Title*, No. 12-cv-21890, 2013 U.S. Dist. LEXIS 136000, *24 (S.D. Fla. July 24, 2013). Chief Judge Federico A. Moreno issued an Order adopting the R&R on September 23, 2013. *See id.* at DE 157. For the reasons stated above, I disagree with the *Floridian Title* court's findings.

(2) *Standing under the P&A Agreement*

First American next claims that even if the FDIC did not forfeit its CPL rights by selling the Loans, it lost the right to bring a CPL claim under the terms of its P&A Agreement with New Bank. The FDIC disagrees and contends that it successfully preserved its rights under the CPL through the P&A Agreement's carve-out provision.

First American provides no legal basis that **[*23]** establishes how it, a non-party to the P&A Agreement, can permissibly interpret the terms of that agreement. First American is not an intended third-party beneficiary of the P&A Agreement; therefore, it has no standing to challenge the interpretation of that Agreement. *See*

Interface Kanner, LLC v. JPMorgan Chase Bank, N.A., 704 F.3d 927, 934 (11th Cir. 2013) (finding that a third party to a P&A Agreement between the FDIC and a new bank did not have standing to enforce its interpretation of that agreement).

Assuming, *arguendo*, that First American does have standing to interpret the P&A Agreement's terms, I will review the language in Section 3.5(b) of the Agreement to determine whether the FDIC preserved its CPL contractual rights. Section 3.5(b) authorized the FDIC to retain any interest, right, action, claim, or judgment against certain individuals and entities, including:

> (i) . . . [any] Person [22] . . . retained by the Failed Bank . . . arising out of any act or omission of such Person in such capacity, (ii) any underwriter of financial institution bonds, banker's blanket bonds or any other insurance policy of the Failed Bank, . . . or (iv) any other Person whose action or inaction **[*24]** may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank.

(P&A Agreement, Trial Exh. D2-80 at 13-14). The acts, omissions, or other events giving rise to any such claim must have occurred before the closing of the bank. *Id.* at 14.

> 22 The P&A Agreement defines a "person" as "any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof, excluding the Corporation." (P&A Agreement, Trial Exh. D2-80 at 6).

As to Subsection 3.5(b)(i) of the P&A Agreement, Old Bank retained First American to provide title insurance and indemnify Old Bank for PTS's conduct during the Ray closings. The FDIC contends that PTS's actions resulted in actual loss and that it brought these claims against First American because of those actions. Subsection 3.5(b)(i) does not contain a requirement that the claim be limited to direct claims or that the act committed by an agent does not apply to this section and I refuse to read such a limitation here. Therefore, the FDIC has standing under Subsection **[*25]** 3.5(b)(i) of the P&A Agreement.

In interpreting Subsection 3.5(b)(ii) of the P&A Agreement, First American would like the Court to read the provision restrictively. Even though the plain meaning of the Subsection explicitly states that the FDIC retained its claims against an underwriter of an insurance policy of Old Bank generally, First American asks the Court to construe the provision to require that the claims relate to the insurance policy only. First American admits that it was an underwriter of the title insurance policies in the Ray transactions and that it issued the CPLs under its role as title insurer. However, First American argues that Subsection 3.5(b)(ii) does not apply in the instant matter because the FDIC no longer holds the title insurance and because the FDIC is not suing First American as an underwriter. The Subsection does not include such restrictions; it identifies the parties, underwriters of insurance policies, against whom the FDIC continues to hold the right to file a claim. Therefore, First American is an underwriter of an insurance policy, Subsection 3.5(b)(ii) applies, and the FDIC has standing.

Lastly, Subsection 3.5(b)(iii) appears to be a catchall provision **[*26]** that authorizes the FDIC to preserve its claims against any party whose actions resulted in a loss to Old Bank. The FDIC alleges that PTS's actions caused it an actual loss and the FDIC is suing First American for reimbursement of that loss under the CPLs. Since the instant suit is undoubtedly related to a loss incurred by Old Bank, I find that the FDIC has standing to bring the instant action under Subsection 3.5(b)(iii) of the P&A Agreement.

First American contends that notwithstanding the fact that Subsection 3.5(b)(i), (ii), and (iii) apply to the instant matter, Section 3.5(b)'s requirement that the acts, omissions, or other events giving rise to any such claim must have occurred before the closing of Old Bank bars the FDIC from bringing its CPL claims in the instant matter. It asks the Court to find that no acts or events occurred prior to Old Bank's failure since the FDIC is suing First American on a breach of contract claim and the acts that brought about such a claim did not occur until after Old Bank closed its doors.

I disagree with First American's contention that no acts or events occurred prior to Old Bank's failure. As the FDIC notes, and I agree, there is a difference **[*27]** between the FDIC's indemnity rights under the CPLs, and

First American's breach of its requirement to indemnify the FDIC. As discussed previously, the CPLs issued by First American in April 2007 gave Old Bank a right of indemnification because Old Bank was to become a lender secured by a mortgage on Mr. Ray's properties, it was to receive title insurance protection from First American, and PTS was to be the closing agent for the sales transactions. Old Bank met these conditions in May 2007 and it had a right of indemnification at that point. In other words, Old Bank and First American entered into an indemnification contract before Old Bank failed. The FDIC retained Old Bank's indemnification rights under the P&A Agreement carve-out. Once the FDIC determined that it had a claim under the CPLs, it notified First American. Even though the instant suit arose in May 2012, when First American first refused to indemnify the FDIC, the events establishing those rights occurred in May of 2007.

Since the issuance of the CPLs occurred prior to Old Bank closing its doors, the acts that gave rise to the FDIC's CPL claims were committed before Old Bank's failure as well. The FDIC, stepping in Old **[*28]** Bank's shoes as receiver, retained that contractual right even after it transferred the Loans to New Bank. I find that FDIC preserved its CPL's contractual rights to assert a claim against First American under Section 3.5(b) of the P&A Agreement.

(3) *Notice under the CPL*

First American next asserts that even if FDIC did preserve its CPL rights, it has not met its burden of proving compliance with the 90-day notice provision. The FDIC argues that it abided by the 90-day notice provision of the CPL. Paragraph D of the CPLs provides:

> Claims of loss shall be made promptly to [First American . . . .] When the failure to give prompt notice shall prejudice [First American] liability of the First American Title Insurance Company hereunder shall be reduced to the extent of such prejudice. [First American] shall not be liable hereunder unless notice of loss in writing is received by [First American] within ninety (90) days from the date of discovery of such loss.

(CPL dated Apr. 30, 2007, Trial Exh. J-57 at 2, J-58 at 2). In the context of CPLs, the "discovery of loss" must encompass not only the discovery of an actual loss, but also the discovery of facts which give rise to a claim covered by the **[*29]** CPLs. [23] The 90-day notice period does not start until the party asserting a CPL claim has knowledge of specific acts giving rise to the claim. *See Floridian Title*, No. 12-cv-21890, 2013 U.S. Dist. LEXIS 136000, *30 (S.D. Fla. July 24, 2013) (citing to *FDIC v. Attorneys' Title Ins. Fund, No. 10-cv-21197, 2011 U.S. Dist. LEXIS 157300, *24 (S.D. Fla. May 17, 2011)* (hereafter, "*Attorneys' Title*"). Once the party with the contractual rights under the CPL obtains the requisite knowledge, it must notify the issuer promptly within ninety days.

> 23 I analyzed the requirements of the CPL's 90-day notice provision in detail in my previously issued Order on Defendant First American's Motion for Summary Judgment. (*See* DE 136 at 9-12 (May 15, 2013)). I find it unnecessary to address what triggers the provision again and I decline to do so here.

Additionally, First American alleges that Sean Newbold ("Newbold"), the FDIC's designated *Federal Rule of Civil Procedure 30(b)(6)* witness, did not have personal knowledge of when the FDIC first discovered the CPL claim and, therefore, the FDIC failed to show it met the 90-day notice provision. The FDIC first received the documents regarding the Ray sales transactions from PTS on April 11, 2012 **[*30]** in response to the FDIC's March 12, 2012 subpoena dues tecum. (*See* PTS's Responses to Subpoena Dues Tecum to FDIC, Trial Exh. P-70). These documents provided the FDIC with the specific acts necessary to establish its claims and triggered the commencement of the 90-day notice period. Before obtaining these specific documents, the FDIC could not have discovered that the wire transfer did not come from Mr. Ray, but had come from Masterhost, and the other information regarding the mortgage fraud scheme. The FDIC submitted its claim to First American eight days later. (*See* Correspondence from Mortgage Recovery Law Group, Trial Exh. J-52). I find the FDIC's notice was timely and prompt. [24]

> 24 The issue of prejudice to First American only arises in determining whether it was notified of the claim promptly within the ninety days. As I find notice was prompt, determining whether First American was prejudiced is unnecessary and I

decline to do so here.

The FDIC has introduced sufficient evidence to show that the documents it received from PTS through the administrative subpoena provided it with the specific facts needed to discover and to allege mortgage fraud. (*See* Trial Tr. vol. 1: 222:3-8 (Newbold); **[*31]** Trial Tr. vol. 2, 15:17-19 (Newbold)).

B. *Breach of Contract*

Finding that the FDIC does have standing to bring CPL claims against First American, I must now determine whether First American breached the CPLs by refusing to reimburse the FDIC. The elements of an action for breach of contract are: (1) the existence of a contract; (2) a breach of the contract; and (3) damages resulting from the breach. *Rollins, Inc. v. Butland, 951 So.2d 860, 876 (Fla. 2d Dist. Ct. App. 2006)* (citing *Knowles v. C.I.T. Corp., 346 So.2d 1042, 1043 (Fla. 1st Dist. Ct. App. 1977))*. While the Parties do not dispute that the CPLs are valid contracts, they disagree as to whether First American breached the contracts, and whether Old Bank's damages flowed from the breach.

In order to determine whether First American breached the CPLs, I must first determine whether PTS's actions triggered First American's indemnification obligation under the CPLs. First American's obligation arises out of:

> 1. Failure of [PTS] to comply with [Old Bank's] written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said **[*32]** mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by [Old Bank], but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due [Old Bank], or
>
> 2. Fraud or dishonesty of [PTS] in handling [Old Bank's] funds or documents in connection with such closing.

(CPL dated Apr. 30, 2007, Trial Exh. J-57 at 1, J-58 at 1). If I find that PTS failed to comply with the Closing Instructions or that it committed dishonesty, then I must next determine whether that misconduct caused FDIC's actual losses.

(1) *Closing Instructions*

The FDIC contends that PTS's failure to comply with the Closing Instructions as they relate to the enforceability of the lien caused an actual loss for which First American must reimburse the FDIC. First American argues that it does not have to indemnify the FDIC because: (1) PTS followed its duties under the Closing Instructions, and (2) even if PTS failed to comply with the Closing Instructions, **[*33]** PTS's actions did not affect the enforceability of the lien since New Bank was able to foreclose on the Loans.

(a) Compliance with the Closing Instructions

I note at the onset that a closing agent owes a fiduciary duty to the parties involved in the sales transactions, absent an express agreement. *The Florida Bar v. Joy, 679 So.2d 1165, 1167 (Fla 1996)*. Consistent with this duty, a closing agent "has a duty to supervise the closing in a reasonably prudent manner." *The Florida Bar v. Hines, 39 So. 3d 1196, 1200 (Fla. 2010)* (quoting *Askew v. Allstate Title & Abstract Co., 603 So. 2d 29, 31 (Fla. 2d Dist. Ct. App. 1992)* (internal quotation marks omitted)). In addition, a closing agent must inform its principal of all material facts relevant to the transaction. *See Sudberry v. Lowke, 403 So. 2d 1117, 1119 (Fla. 5th Dist. Ct. App. 1981)* (citations omitted).

PTS agreed to abide by the Closing Instructions. Under the Instructions, the closing agent was required to notify Old Bank of "any deficiencies or discrepancies with [the] closing instructions or closing documents." (Closing Instructions, Trial Exh. J-17 at 1, J-23 at 1). Moreover, the Closing Instructions specifically stated, "It is the **[*34]** responsibility of the closing agent to verify that ALL closing documents have been properly prepared, executed and dated." *Id.* at 5 (emphasis in original). Under the HUD-1 section of the Closing Instructions, "NO CREDITS [WERE] ALLOWED to be paid on behalf of borrower(s) without prior authorization from" Old Bank. (Closing Instructions, Trial Exh. J-17 at 2, J-23 at 2) (emphasis in original). Furthermore, the Closing Instructions stated that Mr. Ray's loan-to-value

of 90% entitled him to a loan equaling no more than 90% of the value of the property. This instruction meant that with a sales contract price of $305,000 for each unit, Mr. Ray had to pay at least $30,500, as down payment with his own funds. [25] The closing agent had a responsibility to review the closing documents and the wire transfer she received as down payment for the sale transactions to determine whether the borrower had abided by the bank's terms.

25 After fees and other costs, Mr. Ray was to pay a total of $72,429.06.

PTS did not comply with its fiduciary duties as a closing agent, and it did not follow Old Bank's Closing Instructions. In violation of the HUD-1s certified by the PTS closing agents and the Closing Instructions, **[*35]** Mr. Ray did not actually provide any funds for either sales transaction. Instead, Masterhost, a company owned by Christopher Albert, the son and brother of the property sellers, provided the down payment "for Ray's benefit." PTS failed to verify who sent the money on Mr. Ray's behalf. As a result, Old Bank funded two loans at more than 90% financing in violation of the Closing Instructions.

Under the terms of the Closing Instructions, PTS could not simply signoff that the documents were executed without reviewing them for discrepancies. The Closing Instructions charged PTS with ensuring that the closing documents, including the HUD-1s, were accurate. PTS did not do so, and therefore, it failed to comply with the Closing Instructions.

(b) Enforceability

First American argues that because New Bank was able to foreclose on the Loans, PTS's actions did not affect the enforceability of the lien. The FDIC contends that the CPLs' language regarding the enforceability of the lien encompasses more than its ability to foreclose on the Loans since Old Bank received title insurance to address that risk.

Courts have recognized that the title insurance policies and CPLs cover entirely different categories **[*36]** of loss. In one instance, a court stated that CPLs have "nothing to do with title defects." *Chase, 795 F.Supp.2d at 630*. In another, a Florida court acknowledged the difference by finding that a buyer could not sue the insurer for breach of contract under the title insurance, as written, but he could sue the insurer under breach of its duties as closing agent. *See Phrazer Co., Inc. v. Lawyers Title Ins. Corp., 508 So. 2d 731 (Fla. 5th Dist. Ct. App. 1987)*. In *Phrazer*, the buyer obtained access from his property to the highway as required under the title insurance policy, but the buyer did not obtain the preferred direct access. The *Phrazer* court remanded the matter to allow the buyer to amend his complaint to sue the closing agent-insurer since the closing agent-insurer was aware of the buyer's desire to obtain direct access. Although the title insurance policy did not require direct access to the highway, the court found that the buyer could allege the closing agent breached its closing duties. Title insurance addresses, in pertinent part, the ability to foreclose on the property; the CPL relates to the closing agent's conduct during the closing and how the closing agent's conduct **[*37]** affects a mortgage holder's ability to obtain what it bargained for. Since the closing and the title insurance instructions offer different and separate protections, First American's contention that the successful foreclosures on the property demonstrates that PTS's conduct did not impact the enforceability of the lien is misguided.

In *Walsh v. Securities, Inc. v. Cristo Property Management, Ltd., 858 F. Supp. 2d 402, 419 (2012)*, the court found that a lender had coverage under the CPLs for fraudulent mortgage loans because of the closing attorneys' participation in a fraudulent scheme that affected the loans' validity and enforceability. Similar to the present matter, the named buyers were not bona fide purchasers and the buyers did not provide any down payment or secondary financing. The closing attorneys sought straw buyers to apply for the loans and worked exclusively with the same assistant to complete the fraudulent transactions. Once the closing documents were submitted to the lender, the closing attorneys transferred the loan proceeds to themselves and their co-conspirators. *Id. at 409*.

The *Walsh* court explained that a lender has a reasonable expectation that a title insurance **[*38]** policy will insure: "(1) that the borrower is a bona fide mortgage with the financial capacity to make the mortgage payments; (2) that the mortgage is a first-lien on the property subject to foreclosure, if necessary; and (3) the right to seek recovery of a deficiency after foreclosure from the mortgagor." *Id. at 418-19*. When the closing attorneys' conduct affects any of these reasonable expectations and causes a loss to the lender, CPL

coverage is available, even when the lender is able to foreclose on the property. Since the lender in *Walsh* was deprived of a borrower who was a bona fide purchaser in each sales transaction because of the closing attorneys' actions, the lender had standing to bring a suit under the CPLs.

In another case where a party presented an argument similar to First American's argument, the court noted that this argument was "an implausibly short-sighted assessment of the circumstances underlying [the] transaction." *Fifth Third Mortg. Co. v. Kaufman, No. 12 C 4693, 2013 U.S. Dist. LEXIS 16506, 2013 WL 474506, at *3 (N.D. Ill. Feb. 7, 2013)* (hereinafter, *"Fifth Third").* The *Fifth Third* court analyzed a CPL with similar language to the present matter and found that the closing agent's misconduct **[*39]** resulted in the mortgage servicer entering into a mortgage agreement without a bona fide borrower. *Id.* In *Fifth Third*, the seller's attorney in two of the three loans owned and managed the company that served as the closing agent in all three loans. The title insurance company that hired the closing agent issued a CPL to the mortgage servicer that required indemnification for loss associated with the closing agent's failure to abide by the closing instructions related to the "collection and payment of funds due" to the mortgage servicer. [26] The mortgage servicer alleged that the seller, the seller's attorney, the closing agent, and others paid young women to act as straw buyers for various residential property sales, in a short period of time, before the straw buyers' buying histories was discovered. The *Fifth Third* court found that even though the mortgage servicer was successful in foreclosing on the properties, it did not get what it bargained for: a bona fide borrower. The scheme was set up to guarantee an immediate default. The *Fifth Third* court held that "the sham-nature of the bargain cannot be excused or ignored simply because one of the remedies that would have been available **[*40]** to [the mortgage servicer] had the transaction been legitimate remained available to" the mortgage servicer despite the scheme. *Id.*

> 26 Although the *Fifth Third* court examined the CPL provision regarding the "collection and payment of funds due" to the mortgage servicer, its findings apply directly to the enforceability of the lien of the mortgage as well.

As in *Walsh* and *Fifth Third*, Old Bank's reasonable expectation was that it would have: (1) a bona fide mortgagor with the capacity to make mortgage payments; (2) a valid first lien on the property; and (3) the right to seek recovery of a deficiency after foreclosure from the mortgagor. Mr. Ray, the straw buyer, provided no down payment. Since he would not lose any of his own money by defaulting, Mr. Ray had no incentive to pay his mortgages and, in fact, did default on the Loans after only four payments. Without a bona fide mortgagor, the scheme was set up to guarantee a default. PTS's conduct during the closing caused Old Bank to obtain two mortgages without a bona fide mortgagor, and to provide funds to members of a mortgage fraud scheme. Therefore, Old Bank did not receive the bona fide mortgagor for which it bargained and PTS's failure **[*41]** during the closings affected the enforceability of the liens under the CPLs.

(2) *Dishonesty*

The FDIC also claims that PTS's handling of the closing documents submitted to Old Bank amounts to dishonesty. First American contends that the FDIC has not proven this point.

The CPL does not provide a clear definition of "dishonesty." Therefore, I have looked to other types of suits to define the word as used in the CPLs. For example, in a fidelity bond case cited by the FDIC, *Miami Nat'l Bank v. Pa. Ins. Co., 314 F.Supp. 858 (1970)* (hereinafter, "*Miami National*"), the court found that the terms "dishonesty" and "fraudulent" "'include acts which show a want of integrity or breach of trust.' Acts, or a course of conduct, demonstrating an intentional breach of trust or a reckless disregard for the interests of the employer would establish 'fraudulent' or 'dishonest' conduct." *314 F.Supp. at 862* (quoting *Arlington Trust Co. v. Hawkeye-Security Ins. Co., 301 F.Supp. 854, 857-58 (E.D. Va. 1969)*. In *Miami National*, a bank sued its sureties to recover damages under two fidelity bonds that promised indemnification for "any loss through any dishonest, fraudulent or criminal act of any of the employees." **[*42]** *Id. at 860*. The bank alleged that its employee permitted a bank customer to obtain loans that surpassed the bank's authorized limit and allowed the customer to list the names of other individuals as borrowers to avoid detection. The court found that the bank employee's action constituted fraud or dishonesty within the meaning of the fidelity bonds because of: (1) the bank employee's relationship with the customer's principal officers; (2) his control of the loan department;

(3) the highly irregular procedures he employed; and (4) his deliberate circumvention of the loan limit. *Id. at 862-63*. The bank employee's conduct demonstrated that he made unauthorized loans to the bank customer in circumstances showing reckless disregard for the bank's interests. *Id. at 863*.

First American cites to the Florida Supreme Court's standard of dishonesty in the context of attorney misconduct for a definition of dishonesty. In *The Florida Bar v. Head, 84 So. 3d 292 (Fla. 2012)* (hereinafter, "*Head*"), the Florida Supreme Court found that an attorney lied in an affidavit he submitted to the court and used a fake case number in a letter to indicate his client had begun court proceedings against a tenant, **[*43]** when in fact no such proceedings had been filed. Because of these actions, the court held that the attorney had acted with such intent to constitute dishonest conduct. In arriving at its finding, the Florida Supreme Court analyzed the rule banning a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation," R. Reg. Fla. Bar 4-8.4(c), and stated that dishonesty requires a showing of intent. *Head, 84 So. 3d at 300*. However, the court in *Head* explained that this requirement could be met merely by showing that an individual acted deliberately or knowingly. *Id.* (citing *Fla. Bar v. Smith, 866 So. 2d 41, 46 (Fla. 2004)* (recognizing that the motive behind the attorney's action was not the determinative factor but instead the issue was "whether the attorney deliberately or knowingly engaged in the activity in question")). To act "deliberately" would include "willful blindness," i.e. conduct indicating that an individual deliberately closed her eyes to the existence of facts that would otherwise be obvious to her. [27]

> 27 The Florida Supreme Court has held that attorney fiduciaries may not raise ignorance as a defense when accused of dishonest conduct. *See The Fla. Bar v. Terry, 333 So. 2d 24 (Fla. 1976)* **[*44]** (finding attorney fiduciary's ignorance defense inadequate because his role as a fiduciary for an incompetent required him to obtain the knowledge necessary to fulfill his duties). From the Florida Supreme Court's holding, it would make sense that when facts indicate that the individual chose not to learn the information necessary to abide by her fiduciary duties and remained willfully ignorant, the intent necessary to show dishonest conduct exists.

While these definitions of "dishonesty" under fidelity bonds and the ethical rules for attorney fiduciaries have arisen in circumstances other than CPLs, the analogies provide an understanding of dishonesty that I find relevant and applicable. I therefore conclude that in analyzing the language of the CPLs, dishonesty requires a showing of intent. This requirement may be met by showing that an individual acted deliberately, knowingly, willfully blind of facts that would otherwise be obvious, or with reckless disregard for her duties as closing agent during the closing. It is with this standard of "dishonesty" that I review the facts in the instant matter.

Although circumstantial, I find a preponderance of the evidence indicates Ms. Bensema **[*45]** not only facilitated the scheme, but also was complicit in it. This was a classic mortgage fraud scheme. Mr. Ray was a straw buyer. He did not negotiate the prices, he did not negotiate the terms of the mortgage, he had little familiarity with the property, and he did not put any money into the transaction. He claimed to make over twice his real income on his mortgage application. Mr. Ray had no realtor, at least not in any traditional sense of the word. Craig Turturo, who claimed he was simply helping out a fellow firefighter, but who was the son of the man who selected PTS and the brother of the appraiser of the properties, testified falsely concerning his involvement in the case.

The closing agent was the gatekeeper for these transactions and the circumstances of these transactions point towards complicity on the part of PTS. Commonsense tells us that participants in mortgage fraud do not select closing agents who are likely to ask questions and PTS certainly fulfilled that expectation in this scheme. Mr. Ray testified that he received no correspondence whatsoever from anyone at PTS regarding the closing, or instructions for the down payment. He simply showed up on the closing date, **[*46]** signed the closing documents, and left. No one asked him about a down payment, though it was an important part of the transactions. He did not receive the keys until later that day and then he got them from Craig Turturo, who claimed to have no role in the transaction, but who had sent an email to Ms. Bensema reminding her about adding a commission to the HUD-1 forms. (Trial Exh. P-144). Craig Turturo's testimony that he did not know why Ms. Bensema sent him a copy of the HUD-1s and did not remember why he was asking her to make changes on the HUD-1s was not credible. (Trial Tr. vol.

1, 88:1-91:7). It was apparent to me, throughout his testimony, that he was lying about his involvement in the transactions. These events reflect a plan by Craig Turturo, Mr. Ray, and the property sellers to commit mortgage fraud with Ms. Bensema's help.

Ms. Bensema was responsible for preparing for and overseeing the closing, yet she admitted that there were no documents showing she contacted Mr. Ray regarding the closing. The closing files contain none of the documents that would ordinarily be expected, such as communications with the buyer or realtors. After reviewing the evidence in this case, even **[*47]** First American's expert witness, Jerry Aron, testified that the HUD-1s PTS prepared for the closing did not accurately reflect the transactions in dispute. (*See* Trial Tr. vol. 2, 262:25 - 263:6 (Aron)). Ms. Bensema knowingly signed off on the inaccurate HUD-1 of the first sale even though PTS had not received any down payment from Mr. Ray. Ms. Bensema did not notify Old Bank, as was her continuing duty, that the money did not come from Mr. Ray. Ms. Bensema knew of a clear "discrepancy" with regard to the HUD-1s she submitted to Old Bank. (Closing Instructions, Trial Exh. J-17 at 1, J-23 at 1).

Ms. Bensema was unable to explain why she took direction from Craig Turturo, one of the orchestrators of the fraud, but who claimed to have no role in the transactions. (*See* Trial Tr. vol. 1, 129:6-130:25 (Bensema)). The timing of the closings allowed the sellers to use Old Bank's funds to pay the down payment on the second transaction. *Id.* at 223:24-224:2 (Newbold). The evidence suggests that Ms. Bensema recklessly disregarded her obligations to Old Bank because she knew Mr. Ray was involved in a scheme with Craig Turturo. Ms. Bensema knew that Old Bank would not receive the wire transfer documents **[*48]** that listed Masterhost--not Mr. Ray--as the originator, and she additionally knew that the ledger she provided to Old Bank omitted this information. *See id.* at 123:10-124:2 (Bensema); (Trial Exh. J-44, J-48).

Ms. Bensema deliberately closed her eyes to the existence of the mortgage fraud. Ignoring evidence that Mr. Ray was a straw buyer during the closing and that his down payment was not sent by him, but "for [his] benefit" by an unknown third party, does not reflect reasonably prudent supervision. It demonstrates Ms. Bensema's intentional complicity, if not direct involvement in the scheme. The circumstantial evidence demonstrates that Ms. Bensema acted intentionally, with the willful blindness necessary to allow the mortgage fraud scheme to occur. The FDIC met its burden in showing PTS acted with the dishonesty necessary to trigger indemnification under the CPLs.

(3) *Causation*

First American asks the Court to find that the FDIC failed to prove that Old Bank would not have issued the Loans had it known about the Masterhost wire transfers. First American contends that the FDIC should have provided testimony regarding Old Bank's underwriting practices or what Old Bank would have done had **[*49]** PTS notified it that Mr. Ray had not paid the down payments as required in the Closing Instructions. Under Florida law, "the term 'arising out of' is broader in meaning than the term 'caused by' and means 'originating from,' 'having its origin in,' 'growing out of,' 'flowing from,' 'incident to' or 'having a connection with.'" *Taurus Holdings, Inc. v. U.S. Fidelity and Guar. Co., 913 So.2d 528, 539-40 (Fla. 2005)* (citations omitted). Accordingly, use of the term "requires more than a mere coincidence between the conduct . . . and the injury. It requires 'some causal connection, or relationship.' But it does not require proximate cause." *Id.* (citations omitted).

Accordingly, First American's emphasis on what Old Bank would have done with the information is misplaced. The FDIC does not have to prove that Old Bank would not have funded the Loans had it known of Masterhost. Instead, the FDIC had to show a causal connection or relationship between PTS's conduct and the injury. The FDIC has done so. As discussed above, PTS's failure to abide by Old Bank's Closing Instructions and PTS's engagement in dishonesty resulted in Old Bank funding two loans to a straw buyer with no "skin in the game," **[*50]** who defaulted less than six months after the closings. *See Chase, 795 F.Supp.2d at 632* (finding that closing agent's fraud "was the most direct, natural, and foreseeable cause of the loss).

By refusing to reimburse the FDIC for PTS's conduct that triggered indemnification, First American breached the CPLs. Therefore, I find that the FDIC met its burden in demonstrating that First American breached the CPLs at issue in this matter.

C. *Damages*

Under the CPLs, the FDIC is entitled to

reimbursement from First American of "actual loss" incurred in connection with the closings conducted by PTS. During the Ray closings, PTS acted with dishonesty and failed to follow the Closing Instructions that allowed Mr. Ray to procure the Loans by fraud. Since Mr. Ray was a straw mortgagor, he had no incentive to maintain the two properties and pay the mortgage premiums. Mr. Ray defaulted on the Loans after making only four payments. The damages were mitigated on the Loans through foreclosure proceeding and the selling of Units 206 and 308. However, the sale proceeds did not result in recovering all actual losses. The FDIC seeks to recoup its actual losses that resulted from PTS's misconduct.

A party seeking **[*51]** damages must show actual damages, which "are real, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury." *McMillian v. FDIC, 81 F.3d 1041, 1055 (11th Cir.1996)* (internal quotation marks omitted). However, uncertainty as to the amount of damages, or difficulty in proving the exact amount, will not prevent recovery where substantial damages were suffered and there "is a reasonable basis in the evidence for the amount awarded." *Centex-Rooney Constr. Co. v. Martin Cnty., 706 So.2d 20, 28 (Fla. 4th Dist. Ct. App. 1997)* (quoting *Adams v. Dreyfus Interstate Dev. Corp., 352 So.2d 76, 78 (Fla. 4th Dist. Ct. App. 1977)*. Actual damages do not have to be proven "with mathematical precision and may be estimated in any manner which is reasonable under the circumstances." *HGI Assocs., Inc. v. Wetmore Printing Co., 427 F.3d 867, 879 (11th Cir. 2005)* (citations omitted) (internal quotation marks omitted) (discussing damages as they relate to the value of expected profits); *see also Smith v. Austin Dev. Co., 538 So.2d 128, 129 (Fla. 2d Dist. Ct. App. 1989)*; *R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60, 69-70 (Fla. 3d Dist. Ct. App. 1985)* **[*52]** ("The standard for the degree of certainty requires that the mind of a prudent impartial person be satisfied with the damages.").

First American argues that the FDIC should not recover any damages since the FDIC did not offer any evidence detailing how much it recovered from New Bank under the P&A Agreement. Under the Agreement, the FDIC transferred the Loans in dispute at book value. First American contends that since the FDIC has not provided the book value amount, its actual losses are speculative and cannot be calculated.

First American cites to *Chase* to support its argument. In *Chase*, the court found that there was a genuine issue of material fact regarding the FDIC's damages because of its sale of the disputed loans to the new bank. The court explained that the amount for which the loans were transferred to the new bank was material for purposes of summary judgment considerations "because that amount reduces [Old Bank's] 'actual loss,' which directly affects the amount of First American's liability under the CPL." *Chase, 795 F.Supp.2d at 634*; *see also FDIC v. Thompson & Knight, 816 F.Supp. 1123, 1131 (N.D. Tex. 1993)* (finding that the FDIC "received [the] 'full face value' [of **[*53]** the loans in dispute] in exchange for their transfer" to the new bank since the loans were transferred at "book value").

Here, however, the FDIC is not required to offer evidence of actual loss with mathematical precision. Under the reasonable certainty rule, recovery is only denied if the FDIC fails to establish damages to a reasonable degree of certainty. *Nebula Glass Int'l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1212 (11th Cir. 2006)*. Contrary to First American's argument, had the FDIC attempted to calculate the book value of the Loans when they were transferred to New Bank, I would have had to find that the damages were too speculative.

Under the P&A Agreement, New Bank received an estimated $11.8 billion worth of loans as a unit, among other assets, and assumed Old Bank's liabilities. [28] The FDIC cannot determine the value of the Loans when it transferred them to New Bank. (See Trial Tr. vol. 2, 70:7-71:17 (Newbold)). The FDIC's main responsibility when it becomes the receiver of a failing bank is to determine a cost-effective and efficient method of dealing with the bank's assets and liabilities. *See FDIC v. Harrison, 735 F.2d 408, 412 (11th Cir. 1984)* (describing the FDIC's role **[*54]** as receiver); FDIC, MANAGING THE CRISIS: THE FDIC AND RTC 215-217 (1998) (same). As receiver, the FDIC attempts to ensure service continuity and that panicked depositors do not withdraw their funds from the bank. *Id.* In the midst of a bank closing, to require the FDIC to provide a calculation of the book value of each loan in a failing bank's portfolio as of the date of the transfer for fear that the FDIC would later discover a mortgage fraud scheme, or some other claim, would be impractical.

28 The P&A Agreement was a negative transaction for the FDIC. The FDIC paid New Bank $4 billion to take over the entire bank. (*See*

> Trial Tr. vol. 2, 63:2-70:6 (Newbold)). Although New Bank obtained an estimated $11.8 billion worth of loans as one unit, the fact that the FDIC had to pay New Bank to accept Old Bank's loans puts into question whether any of the loans had any value at all.

The FDIC need only establish a reasonable basis for calculating damages and it has done so. The FDIC provided two methods for calculating its damages: (1) the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), *12 U.S.C. § 1821(l)*, [29] method of principal losses and interest minus any funds **[*55]** its received through the foreclosure proceeding; or (2) the net realized after foreclosure and sale of the property securing the loan. In either formula, the FDIC asks the Court to consider the loss at the time the properties were sold. Calculating the loss applying either formula, the FDIC contends, results in the same loss amount.

29 Section *§ 1821(l) of FIRREA* states:

> In any proceeding related to any claim against an insured depository institution's director, officer, employee, agent, attorney, accountant, appraiser, or any other party employed by or providing services to an insured deposition institution, recoverable damages determined to result from the improvident or otherwise improper use or investment of any insured depository institution's assets shall include principal losses and appropriate interest.
>
> *12 U.S.C. § 1821(l)*

Applying the net realized calculation, Formula (2), would be consistent with the CPL's indemnification for actual loss. In *First American Title Ins. Co. v. Vision Mortgage Corp., 298 N.J. Super. 138, 689 A.2d 154 (N.J. Super. Ct. App. Div. 1997)* (hereinafter "*Vision Mortgage*"), a New Jersey court interpreted identical CPL language regarding "actual loss" and found that it was the **[*56]** outstanding loan balance less the sales proceeds of the collateral property. In *Vision Mortgage*, the court found that, because of First American's agent's fraud, there was no bona fide mortgagor to make mortgage payments and that the loss should be calculated from the foreclosure sale. [30] *Id. at 157*; *see also Attorneys' Title, No. 10-cv-21197, 2011 U.S. Dist. LEXIS 157300, *15 (S.D. Fla. May 17, 2011)* (adopting the logic of *Vision Mortgage*). I find *Vision Mortgage's* interpretation of actual loss persuasive and find that "actual loss" under the CPLs requires the calculation of the net realized after foreclosure and sale of the properties securing the Loans in this matter. Using the net sale proceeds provides more certainty and a more reasonable calculation of damages where, as here, the FDIC, as receiver, transferred the Loans through a P&A Agreement with New Bank at book value.

30 First American contends that *Vision Mortgage* is not relevant to measuring damages where the underlying notes and mortgages are transferred to a third party, but I disagree. Whether the FDIC incurred an actual loss is the question at bar, not whether it still owns the Ray Loans. Calculating the damages at the foreclosure sale allows **[*57]** for certainty and is a reasonable basis for valuing the Loans at issue.

Since the record contains sufficient evidence of the total debt--unpaid principal balance, accrued interest, and taxes, insurance, and other expenses--and the net proceeds from the sale of each property, I find that FDIC has met its burden in proving its actual damages in the instant matter. Since the FDIC has shown actual losses, I find that the resultant damages suffered from PTS's misconduct are calculated as follows:

(1) *Unit 206*

Unpaid Principal Balance	$278,904.90
+ Accured Interest	+ $38,917.70
+ Taxes/Insurance/Other Expenses	+ $19,589.80
TOTAL DEBT	$336,912.46

Total Debt	$336,912.46
- Net Sale Proceeds	- $71,361.74
TOTAL LOSS	**$265,550.72**

(2) *Unit 308*

Unpaid Principal Balance	$278,904.90
+ Accured Interest	+ $25,468.15
+ Taxes/Insurance/Other Expenses	+ $3,774.31
TOTAL DEBT	$308,183.36
Total Debt	$308,183.36
- Net Sale Proceeds	- $72,762.29
TOTAL LOSS[31]	**$235,421.07**

31 Even though the FDIC received $79,012.82 from its insurance policy on Unit 308, under Florida's collateral source rule, "an injured party [is permitted] to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by a source **[*58]** independent of the tortfeasor . . . ." *Gormley v. GTE Products Corp., 587 So. 2d 455, 459 (Fla. 1991)* (plurality opinion) (per curiam) (quoting 3 Jerome H. Nates *et al.*, *DAMAGES IN TORT ACTIONS* 17 (1988)). Therefore, the FDIC's damages shall not be offset by the iLOSS31ce benefits.

III. CONCLUSION

Based upon the Court's findings set forth above, the FDIC has established by a preponderance of the evidence that First American has breached the CPLs. For these reasons, Judgment is entered in favor of the FDIC as to its breach of contract claims against First American, which are Counts IV and VIII of the Complaint. Judgment should be entered in favor of the FDIC against First American in the amount of $265,550.72 as to Count IV and $235,421.07 as to Count VIII by separate order.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 4 day of October, 2013.

/s/ Donald M. Middlebrooks

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

MACHELL D. WASHINGTON, Plaintiff, v. BAC HOME LOANS SERVICING, L.P., f/k/a COUNTRYWIDE HOME LOANS SERVICING, L.P., and INTERNATIONAL PLATINUM, INC., d/b/a RIGHT TO CANCEL.COM, Defendants.

Civil Case No. 12-12940

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2013 U.S. Dist. LEXIS 142256

October 2, 2013, Decided
October 2, 2013, Filed

SUBSEQUENT HISTORY: Motion denied by *Washington v. BAC Home Loans Servicing, L.P., 2013 U.S. Dist. LEXIS 172539 (E.D. Mich., Dec. 9, 2013)*

COUNSEL: [*1] For Machell D. Washington, Plaintiff: Stuart Sandweiss, Southfield, MI.

For BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP, Defendant: Laura Baucus, Dykema Gossett (Bloomfield Hills), Bloomfield Hills, MI; Samantha L. Walls, Dykema Gossett PLLC, Bloomfield Hills, MI.

JUDGES: Honorable PATRICK J. DUGGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: PATRICK J. DUGGAN

OPINION

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter arises from the foreclosure of property at 17357 Denby, Redford, Michigan ("Property") and Michigan state court proceedings to evict Machell D. Washington ("Washington") from the Property, which were initiated by BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loan Servicing, L.P. ("BAC" or "BANA"). [1] In response to the eviction proceedings, Washington filed a counter-complaint against BAC and a third-party complaint against International Platinum, Inc., d/b/a Right to Cancel.com ("International Platinum"). Washington's counter- and third-party complaint set forth the following counts: (I) injunctive relief; (II) slander of title/quiet title; (III) fraud/constructive fraud; (IV) violations of the Fair Debt Collection **[*2]** Practices Act ("FDCPA"); (V) breach of contract/promissory estoppel; and, (VI) declaratory relief. (ECF No. 1-3.)

1 Effective July 1, 2011, BAC merged with and into Bank of America, N.A. ("BANA"). BANA therefore is now the proper party to respond to the Complaint. In this decision, the Court will interchangeably use "BAC" or "BANA" to refer to this party, depending on whether the discussed conduct occurred before or after the merger.

The state district court severed the eviction action from Washington's counter- and third-party complaints, after which BAC removed the counter- and third-party complaints to federal court pursuant to *28 U.S.C. §§ 1331*

and *1441*. [2] It is now before the Court on BANA's motion for judgment on the pleadings, filed pursuant to *Federal Rule of Civil procedure 12(c)* on January 28, 2013. Washington filed a response to BANA's motion on March 5, 2013. The parties thereafter stipulated to a number of orders extending the time for BANA to file its reply brief, as the parties were engaged in settlement negotiations. Apparently signaling that their efforts failed, BANA filed a reply brief on September 23, 2013. This Court issued a notice to the parties on September 30, **[*3]** 2013, dispensing with oral argument with respect to BANA's motion pursuant to Eastern District of Michigan Local Rule 7.1(f). For the reasons that follow, the Court grants the motion.

> 2 At the time of the removal, Washington had not yet served International Platinum with the third-party complaint. On December 11, 2012, this Court issued an order for Washington to show cause why the action should not be dismissed against International Platinum for failure to serve. (ECF No. 6.) This Court issued an order dismissing International Platinum on January 11, 2013, when Washington failed to respond to the show cause order. (ECF No. 7.)

I. Applicable Standard

A motion for judgment on the pleadings pursuant to *Rule 12(c) of the Federal Rules of Civil Procedure* is subject to the same standards of review as a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted. *Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998)*. A motion to dismiss pursuant to *Rule 12(b)(6)* tests the legal sufficiency of the complaint. *RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134 (6th Cir. 1996)*.

Under *Federal Rule of Civil Procedure 8(a)(2)*, a pleading must contain **[*4]** a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action . . ." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)*. A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678 , 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 557, 127 S. Ct at 1966*).

As the Supreme Court provided in *Iqbal* and *Twombly*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly, 550 U.S. at 570, 127 S. Ct. at 1974*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly, 550 U.S. at 556, 127 S. Ct. at 1965*). The plausibility standard "does not impose a probability **[*5]** requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly, 550 U.S. at 556, 127 S. Ct. at 1965*.

In deciding whether the plaintiff has set forth a "plausible" claim, the court must accept the factual allegations in the complaint as true. *Id.; see also Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)*. This presumption, however, is not applicable to legal conclusions. *Iqbal, 556 U.S. at 668, 129 S. Ct. at 1949*. Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly, 550 U.S. at 555, 127 S. Ct. at 1965-66*). Although a court ruling on a *Rule 12(b)(6)* motion "primarily considers the allegations in the complaint," matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be considered. *Amini v. Oberlin Coll., 259 F.3d 493, 502 (6th Cir. 2001)* (citation omitted).

II. Factual and Procedural Background

On April 18, 2008, Washington obtained a $87,061.00 mortgage loan from Taylor, Bean & Whitaker Mortgage Corporation **[*6]** ("originating lender"). (Compl. ¶ 4; Def.'s Mot. Ex. A.) As security for the loan, Washington granted a mortgage on the Property to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the originating lender and its successors and assigns. [3] (*Id.*; Def.'s Mot. Ex. B.) The mortgage was recorded in the Wayne County Register of Deeds on September 18, 2008. (Def.'s Mot. Ex. B.) MERS assigned the mortgage to BAC on January 9, 2010. (Def.'s Mot. Ex. C.) The assignment was recorded in the Wayne County Register of Deeds on March 1, 2010. (*Id.*)

3 In her Complaint, Washington identifies the Property as 3859 Fadi, Troy, Michigan. (Compl. ¶ 1.) It appears that this was a drafting error by Washington's former counsel.

In January 2010, following Washington's default on the mortgage loan (*see* Compl. ¶ 9), BAC initiated foreclosure by advertisement proceedings with respect to the Property. (Def.'s Mot. Ex. D.) The notice required under Michigan's foreclosure by advertisement statute was sent to Washington on January 29, 2010, and published in the Detroit Legal News on January 29, 2010. (*Id*). Washington did not contact BAC's authorized designee through a housing counselor to set up a **[*7]** meeting to modify the loan within the time period allotted under the foreclosure by advertisement statute. (*Id.*) She alleges that she did contact the loan servicer directly to obtain a loan modification but was told over the phone that she did not qualify. (Compl. ¶ 10.)

Therefore, notice of the foreclosure sale was published in the Detroit Legal News on February 26 and March 5, 12, and 19, 2010. (Def.'s Mot. Ex. D.) Notice of the foreclosure sale also was posted at the Property on March 2, 2010. (*Id.*) At a sheriff's sale on March 31, 2010, BAC purchased the Property for $91,328.60. (*Id.*)

The redemption period with respect to the Property expired on September 30, 2010. (*Id.*) After Washington failed to redeem by that date, BAC initiated eviction proceedings in Michigan district court. In response, as indicated, Washington filed a counter-complaint against BAC and a third-party complaint against Platinum International. On June 4, 2012, the district judge severed the proceedings and stayed the eviction proceedings. (ECF No. 1-2.) Washington was required to pay $550 per month in escrow as a condition for the stay. On October 22, 2012, the stay was lifted after Washington failed to make escrow **[*8]** payments and a default judgment of possession was entered. (Def.'s Mot. Ex. E.)

III. Applicable Law and Analysis

Washington raises five arguments in response to BANA's motion for judgment on the pleadings, which the Court will rely upon in deciphering what violations she is alleging BAC committed that entitle her to the relief requested. Those arguments, as summarized in the response, are:

> I. The failure to record the assignment of mortgage into [the] chain of title prior to the commencement of the foreclosure process violated [*Michigan Compiled Laws] § 600.3204(1)(d).*
>
> II. The mortgage assignment to the foreclosing lender was a nullity violating [*Michigan Compiled Laws] § 600.3204(3).*
>
> III. Defendant violated the mediation counseling provisions of *Chapter 32 of Michigan Compiled Laws* rendering the sheriff's sale and deed invalid.
>
> IV. Overbidding an FHA property violated [*Michigan Compiled Laws] § 600.3228*.
>
> V. Plaintiff had standing to challenge the foreclosure sale after expiration of the redemption period.

(Pl.'s Resp. at 2.) Washington does not respond to BANA's persuasive arguments for dismissal of her fraud/constructive fraud and breach of contract/promissory estoppel claims (the latter **[*9]** of which she in fact states she no longer is pursuing). (*See id.* at 11.) As such, Washington effectively has abandoned those claims against BANA.

Foreclosures by advertisement, as well as the rights of both the mortgagor and mortgagee after the foreclosure sale has occurred, are governed by statute under Michigan law. *Conlin v. Mortg. Elec. Registration Sys., Inc., 714 F.3d 355, 359 (6th Cir. 2013)* (applying Michigan law) (citing *Munaco v. Bank of America, 513 Fed. Appx. 508, 2013 WL 362752, at *3 (6th Cir. 2013))*. After the sale of foreclosed real property, the mortgagor is provided a six-month period in which to redeem the property. *Conlin, 714 F.3d at 359*. If the mortgagor fails to redeem before this period expires, the mortgagor's "right, title, and interest in and to the property" are extinguished. *Piotrowski v. State Land Office Bd., 302 Mich. 179, 4 N.W.2d 514, 517 (1942)*; *see also Mich. Comp. Laws § 600.3236*. To that end, a court may only set aside a completed foreclosure sale after the expiration of the redemption period upon "a clear showing of fraud or irregularity as to the foreclosure proceeding itself, and not simply as to any conduct by a defendant." *Houston v. U.S. Bank Home Mortg. Wisconsin Servicing, 505 F.*

App'x 543, 549 (6th Cir. 2012).

Therefore, **[*10]** Washington must make "a clear showing of fraud or irregularity as to the foreclosure proceeding itself" in order for the Court to set aside the sheriff's sale. If Washington cannot make this showing, she cannot demonstrate that she has title to the Property superior to BANA. *See Williams v. Pledged Property II, LLC, 508 F. App'x 465, 468 (6th Cir. 2012)*. In that case, she will have no basis to recover the relief she seeks in Counts I, II, or VI of her counter-complaint. *See Goryoka v. Quicken Loan, Inc., 519 F. App'x 926, 929 (6th Cir. 2013)* (explaining that requests to quiet title and for injunctive relief are remedies, not separate causes of action).

A party may foreclose by advertisement if certain conditions are met. These include that "[t]he mortgage containing the power of sale has been properly recorded" and that "[t]he party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." *Mich. Comp. Laws § 600.3204(1)(c), (d)*. The statute also provides: "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall **[*11]** exist *prior to the date of sale* under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage." *Id. § 600.3204(3)* (emphasis added). *Section 600.3216* addresses the time and place of the sheriff's foreclosure sale. *Mich. Comp. Laws § 600.3216*. As such, to comply with the foreclosure by advertisement statute, the assignment to BAC had to be recorded only before the date of the sheriff's sale (i.e. March 31, 2010). The assignment was recorded on March 1, 2010.

Washington alleges that she "never received notice of the Sheriff's Sale by posting." (Compl. ¶ 17.) This assertion is belied by the public record. (*Id.* Ex. D.) She also alleges that she was wrongfully denied a loan modification in violation of Michigan's loan modification provisions. [4] Michigan's foreclosure by advertisement statute, however, "does not require [the lender] to modify any specific loan, and it does not provide any basis for unwinding the foreclosure." *Ellison v. JP Morgan Chase, N.A., No. 12-12629, 2012 U.S. Dist. LEXIS 142386, at *13 (E.D. Mich. Oct. 2, 2012)* (Cohn, J.); *see also Benford v. CitiMortgage, Inc., No. 11-12200, 2011 U.S. Dist. LEXIS 130935, at *5 (E.D. Mich. Nov. 14, 2011)* **[*12]** (Duggan, J.) ("[T]he statute does not permit the Court to set aside a completed foreclosure sale."). Rather, the sole remedy in the statute for commencing a foreclosure in violation of the loan modification procedures is for the mortgagor to convert a foreclosure by advertisement into a judicial foreclosure before it is completed. *Mich. Comp. Laws § 600.3205c(8)*. In the instant action, however, the foreclosure is complete.

> 4 Washington also alleges that BAC violated Department of Housing and Urban Development ("HUD") regulations. (*See, e.g.*, Compl. ¶ 27; *see also* Pl.'s Resp. Br. at 13.) However, "there is no private cause of action under these regulations. *Bank of America, N.A. v. Dennis, No. 12-11821, 2013 U.S. Dist. LEXIS 41642, 2013 WL 1212602, at *3 (E.D. Mich. Mar. 25, 2013)* (Steeh, J.) (citing *Baumgartner v. Wells Fargo Bank, N.A., No. 11-11821, 2012 U.S. Dist. LEXIS 83254, 2012 WL 2223154, *4 (E.D. Mich. June 15, 2012)* (dismissing similar claim); *Federal Nat. Mortg. Ass'n v. LeCrone, 868 F.2d 190, 193 (6th Cir. 1989)* (noting that "no express or implied right of action in favor of the mortgagor exists for violation of HUD mortgage servicing policies.")).

Finally, Washington contends that the sheriff's sale should be set aside because BAC **[*13]** "over bid the Property" in violation of *Michigan Compiled Law § 600.3228*. (Compl. ¶¶ 14, 26.) *Section 3228* provides, only, that "[t]he mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale." *Mich. Comp. Laws § 600.3228*. BAC's bid for the Property was a "full credit bid" and Washington does not deny that she owed this amount on the loan.

Washington, however, claims the bid was unlawful because it was allegedly "50% greater than the current fair market value of the Property." (Compl. ¶ 14.) This argument was recently rejected by one judge in this District, who noted that such bids actually help a borrower because in such situation the borrower "is no longer liable for the debt." *See Rubin v. Fannie Mae, No. 12-12832, 2012 U.S. Dist. LEXIS 170226, 2012 WL 6000572, at *2 (E.D. Mich. Nov. 30, 2012)* (Hood, J.); *see also New Freedom Mortg. Corp. v. Globe Mortg. Corp., 281 Mich. App. 63, 68, 761 N.W.2d 832, 836 (2008)* (citations omitted) (reflecting approval for full credit bids); *Bank of America, N.A. v. Dennis, No.*

12-11821, 2013 U.S. Dist. LEXIS 41642, 2013 WL 1212602, at 4 (E.D. Mich. Mar. 25, 2013) (Steeh, J.) (rejecting the borrower's **[*14]** argument that credit bidding was a bad faith violation of *Michigan Compiled Laws § 600.3228*). Washington fails to convince the Court that this regular practice violates Michigan law.

As such, Washington fails to demonstrate fraud or irregularity in connection with the foreclosure process, itself. Even if Washington made such a showing, however, she fails to allege how she was prejudiced by these irregularities. For the alleged foreclosure defects to be actionable to set aside the foreclosure sale, Washington must allege prejudice resulting from the defects. *See Conlin, 714 F.3d at 361-62* (citing *Kim v. JPMorgan Chase Bank, N.A., 493 Mich. 98, 825 N.W.2d 329 (2012)*). To demonstrate such prejudice, Washington must show that she would have been in a better position to preserve her interest in the property absent [BAC's] noncompliance with the statute." *Kim, 493 Mich. at 115-16, 825 N.W.2d at 337*.

This leaves Washington's FDCPA claim. BANA argues that this claim fails on its merits because BAC was not acting as a "debt collector," as defined in the statute, but rather in the course of its business as a loan servicer. (Def.'s Br. in Supp. of Mot. at 17-18.) As defined in the FDCPA, the term **[*15]** "debt collector" does not include any person attempting to collect "any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person. *15 U.S.C. § 1692a(6)(F)(iii)*). Relying on the Sixth Circuit's decision in *Glazer v. Chase Home Finance LLC, 704 F.3d 453 (2013)*, Washington argues that because the assignment of the mortgage to BAC was a nullity, BAC was not a foreclosing lender and was a debt collector under the statute. (Pl.'s Resp. Br. at 12-13.)

Washington argues that the assignment of the mortgage to BAC was a nullity because BAC was not the holder of the note at the time of the assignment. This argument is frivolous under Michigan Supreme Court precedent holding that the mortgage and note "need not be in the same hands." *Residential Funding Co. v. Saurman, 490 Mich. 909, 910, 805 N.W.2d 183, 184 (2011)*. Accordingly, BAC in fact was a mortgagor and "creditors, mortgagors, and mortgage servicing companies are not debt collectors and are statutorily exempt from liability under the FDCPA." [5] *Mohlman v. Long Beach Mortg. Extinct Lender, No. 12-10120, 2013 U.S. Dist. LEXIS 17074, 2013 WL 490112, at *4 (E.D. Mich. Feb. 8, 2013)* **[*16]** (Rosen, C.J.) (citing *Scott v. Wells Fargo Home Mortg. Inc., 326 F. Supp. 2d 709, 718 (E.D. Va. 2003)*; *Givens v. HSBC Mortg. Services, 08-10985, 2008 U.S. Dist. LEXIS 65846, 2008 WL 4190999 at *1 (E.D. Mich. Aug. 26, 2008)* ("[I]t is well settled that the provisions of the FDCPA apply only to professional debt collectors, not creditors or mortgagors.")).

> 5 BANA states that BAC also was the servicer, although this is not evident to the Court from Washington's counter-complaint or the public record.

Moreover, Washington has not pleaded any facts illustrating BAC's purported debt collection activities or how these activities violated the FDCPA. Instead, she merely recites the elements of the statute. This is insufficient to state a claim on which relief may be granted. *Iqbal, supra.*

IV. Conclusion

For the above reasons, the Court concludes that Washington's counter-complaint against BAC/BANA fails to state a claim on which relief may be granted.

Accordingly,

IT IS ORDERED, that Defendant Bank of America, N.A.'s Motion for Judgment on the Pleadings is **GRANTED.**

Dated: October 2, 2013

/s/ PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE